TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 320

NATIONAL PAPER AND TYPE CO., PLAINTIFF IN ERROR,

vs.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MARCH 11, 1924

(30,187)

(30,187)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the Court before you, or some of you, between National Paper and Type Co., plaintiff, and Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, defendant, a manifest error hath happened to the great damage of said plaintiff as is said and appears by its complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the plaintiff as aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Judges of the United States Supreme Court at the City of Washington, together with this writ, so that you have the same at the said place before the said Supreme Court aforesaid on the 31st day of March, 1924, that the record and proceedings aforesaid being inspected the said Judges of the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 5th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-Four, and of the Independence [fol. 2] of the United States the One Hundred and Forty-Eighth.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

Wm. Bondy, United States District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

NATIONAL PAPER & TYPE COMPANY

against

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York

SUMMONS AND SERVICE—Filed Jan. 26, 1924

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 25th day of January, A. D. 1924.

Alex. Gilchrist, Jr., Clerk. Lord, Day & Lord, Plaintiff's Attorney. Office and Post Office Address, 25 Broadway, Borough of Manhattan, New York City.

Copy of summons and complaint received January 26, 1924.

Frank K. Bowers, Collector of Internal Revenue for the Second District of New York.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED COMPLAINT—Filed Feb. 19, 1924

The plaintiff above named, by its attorneys, Lord, Day & Lord, complaining of the above named defendant, alleges as follows:

First. That the plaintiff is and at all the times hereinafter mentioned was a corporation organized and existing under the laws of the State of New Jersey, with principal place of business in the city of New York in the United States, and during all of such times was and still is engaged within the United States in the business of exporting, that is to say, the purchase of personal property within the United States by said plaintiff and the sale of such personal property without the United States by said plaintiff, with capital invested in said business of exporting.

Second. That there are, and at all times hereinafter mentioned were, foreign corporations organized, authorized or existing under the laws of foreign countries, which are and were engaged in the business of exporting within the United States, that is to say, the purchase of personal property within the United States by said for- [fol. 5] eign corporations and the exportation and sale of such personal property without the United States by said foreign corporations, and that under the protection of the United States said foreign corporations have invested large amounts of capital in said business of exporting carried on by said foreign corporations within the United States; and that under Sections 217 and 233 of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921, said foreign corporations were wholly exempted from the payment of tax on the net income or profits accruing or derived from said business of exporting carried on by said foreign corporations within the United States.

Third. On information and belief, that at all the times hereinafter mentioned defendant was, and at the time of the commencement of this action is, the United States Collector of Internal Revenue for the Second District of New York, and was and is a citizen of the State of New York, and a resident of the Southern District of New York.

Fourth. That on or about the 15th day of March, 1922, the defendant, acting as such Collector of Internal Revenue, and claiming to act under and in pursuance of the provisions of Sections 230 and 205 of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921, demanded of the plaintiff the sum of Four Thousand Two Hundred Three and 91/100 Dollars ($4,203.91), which said Collector claimed as due and payable from said plaintiff as and for one-fourth part of the income tax for plaintiff's fiscal year ending March 31, 1921, that is, for the last quarterly or [fol. 6] three-months' period of said fiscal year, or the months of January, February and March, 1921 (being such last part of the sum of $16,796.31 paid as such tax for said fiscal year, the remainder of which sum was imposed and paid under the provisions of the Revenue Act of 1918), and claimed that the said sum of Four Thousand Two Hundred Three and 91/100 Dollars ($4,203.91) was due and payable from said plaintiff on or before March 15, 1922, and threatened to enforce the payment of the said sum together with the penalties and interest thereon provided by the laws of Congress.

Fifth. That thereupon the plaintiff did, on or about the 15th day of March, 1922, solely in order to prevent distraint and sale of its property, and upon compulsion, and under duress and coercion, involuntarily pay to the defendant as such Collector of Internal Revenue, the said sum of Four Thousand Two Hundred Three and 91/100 Dollars ($4,203.91), and the plaintiff, at the time of said payment, protested to the defendant in writing that no tax was due from the plaintiff and that the defendant was without authority to exact or collect the same, or any part thereof.

Sixth. Upon information and belief, that there was not on the 15th day of March, 1922, nor at any other time, any sum due from the plaintiff for, or on account of, any tax imposed by said sections of said Act of Congress, and the defendant, as such Collector of Internal Revenue, or otherwise, was without authority to exact or collect the said sum from plaintiff, or any part thereof.

Seventh. That the assessment and collection by said Collector of [fol. 7] Internal Revenue under said Revenue Act of 1921 of the amount of Three Thousand Nine Hundred Ninety-Nine and 08/100 Dollars ($3,999.08), as and for an alleged tax on said plaintiff's net income or profits accruing or derived from said business of exporting transacted by said plaintiff within the United States was not the exertion of taxation but the confiscation or taking of plaintiff's property in violation of the Fifth Amendment of the Constitution of the United States inasmuch as under Sections 217 and 233 of said Revenue Act of 1921 said foreign corporations were wholly or entirely exempted from the payment of like tax on like net income or profits accruing or derived from the like business of exporting transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which business of exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the same or like manner as said plaintiff transacted the like business of exporting within the United States that is to say, the purchase of personal property within the United States and the sale of such personal property without the United States.

Eighth. That the taxation imposed under said Revenue Act of 1921 upon the net income or profits of the plaintiff accruing or derived from the said business of exporting transacted in the United States with capital invested in the United States by said plaintiff [fol. 8] imposed a direct and immediate burden on said plaintiff's business of exporting transacted within the United States, in violation of the provisions of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of exporting transacted in the United States with capital invested in the United States by said foreign corporations was wholly exempted by said Revenue Act of 1921 from like taxation.

Ninth. That on or about the 6th day of December, 1922, the plaintiff, in accordance with the provisions of law and the regulations of the Treasury Department in such cases made and provided, made a claim and application in writing to the Commissioner of Internal Revenue and duly demanded the refund and repayment to it of the aforesaid sum of Sixteen Thousand Seven Hundred Ninety-Six and 31/100 dollars ($16,796.31), which included the aforesaid sum of Four Thousand Two Hundred Three and 91/100 Dollars ($4,203.91) on the ground that the said tax was illegally assessed

and collected, in violation of the provisions of the Constitution of the United States.

Tenth. That more than six months have now expired since the filing of said claim for said refund, as provided by Section 1318 of said Revenue Act of 1921, and no part of the amount of said claim has been remitted, refunded or repaid to this plaintiff, or any one, for its account.

Wherefore, plaintiff demands judgment against the defendant [fol. 9] for the said sum of Three Thousand Nine Hundred Ninety-Nine and 08/100 Dollars ($3,999.08), together with interest thereon from March 15, 1922; together with costs and disbursements.

Lord, Day & Lord, Attorneys for Plaintiff. Office and Post Office Address, 25 Broadway, Borough of Manhattan, New York City.

Jurat showing the foregoing was duly sworn to by Harrison C. Lewis omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIR: Please take notice that upon the amended complaint herein and upon all the other papers and proceedings had herein, the undersigned will move this Court at a stated term for the hearing of motions to be held in Room 235 of the United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, on the 29th day of February, 1924 at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order granting judgment dismissing the said amended complaint upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action and for such other and further general relief as the Court may deem just in the premises. Dated: New York, February 27, 1924.

Yours, etc., William Hayward, United States Attorney for the Southern District of New York, Attorney for defendant. Office and P. O. address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

To Lord, Day Lord, Esqs., Attorneys for Plaintiffs. Office and P. O. Address, 25 Broadway, New York City.

[fol.11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM DECISION—Filed Feb. 29, 1924.

Motion granted on authority of National Paper & Type Company v. Edwards, 292 Fed. 633.

Julian W. Mack, U. S. C. J.

[fol. 12] IN UNITED STATES DISTRICT COURT

(District Court S. D. New York, May 26, 1923)

OPINION IN CASE OF NATIONAL PAPER & TYPE CO. v. EDWARDS, COLLECTOR OF INTERNAL REVENUE

MACK, Circuit Judge:

This is a suit to recover the sum of $183,844.14 income and excess-profits taxes assessed against the plaintiff for the fiscal year ending March 31, 1919, under sections 230, 233 and 301 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, secs. 6336 1/8m, 6336 1/8p, 6336 7/16aa),[1] and alleged to have been paid by the plaintiff under protest.

[fol. 13] It appears from the complaint that during the year in question the plaintiff was engaged in the business of exporting goods from the United States and of selling such goods in foreign countries. The total gross business of the plaintiff for the period was $6,435,512.69, of which amount $6,295,165.87 were

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[1] The pertinent parts of the Revenue Act of 1918 here involved are:

Sec. 230. (a) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and

(2) For the calendar year thereafter, 10 per centum of such excess amount.

* * * * * * *

Sec. 233. (a) That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in section 213, except that: * * *.

(b) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States.

Sec. 301 (a) That in lieu of the tax imposed by title II of the Revenue Act of 1917 but in addition to the other taxes imposed by this act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following: * * *

sales of goods by the plaintiff in foreign countries after the goods had been exported there, and $158,346.82 were sales to export commission merchants in this country with the intent and purpose that the goods should be exported and with the result that the goods were actually exported. The validity of the taxes assessed is assailed in the complaint on two grounds: (a) That the taxes are upon exports in violation of article 1, section 9, clause 5, of the Constitution; and (b) that the taxes are unequal, discriminating, and unfair, and in consequence null and void, because the income of foreign corporations engaged in exporting goods from the United States is not subject to tax under similar circumstances. The defendant has moved for judgment on the pleadings on the ground that the facts alleged are not sufficient to constitute a cause of action.

In the light of the decision in Peck & Co. v. Lowe, Collector, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049, in which the Supreme Court held, under the Income Tax Law of 1913, that income of do- [fol. 14] mestic corporations derived from the business of export was within the taxing power of Congress and was not in violation of article I, section 9, clause 5, of the Constitution, plaintiff in its brief has abandoned its attack on these taxes as in violation of this provision of the Constitution. It now concentrates its attack upon the law on the ground that, as interpreted by the Attorney General (32 Op. Attys. Gen. 336), and as enforced by the Treasury it deprives the plaintiff of property without due process of law in violation of the Fifth Amendment, because it imposes upon the plaintiff's business discriminatory and unequal burdens which are not imposed upon foreign corporations similarly situated.

It is admitted by the government that the acts of 1909 (36 Stat. 11) and 1913 (38 Stat. 166, 172), the wording of which differs slightly from that of the act of 1918, were in practice applied, at least to some extent, to foreign corporations in respect of income derived from the sale in foreign countries of gods manufactured or acquired in the United States.[2] It is unnecessary, however, here to consider the proper interpretation to be *be* given to the acts of 1909 and 1913 or the act of 1918 as applied to foreign corporations, since I am satisfied of the constitutionality of the law as applied to the plaintiff, even [fol. 15] though the income of foreign corporations from like sources is construed to be exempt.

There is, as is now conceded, no question as to the power of Congress to tax the net income of domestic corporations derived from their export business. The question as to how far it is wise and proper to extend our taxing laws to foreign corporations that manufacture or acquire goods in this country, and sell them abroad, involves many economic and political considerations. These are peculiarly within the province of Congress, not the courts. It is perhaps inevitable

[2] It may be noted in passing that under section 217 (e) of the Revenue Act of 1921 (42 Stat. 245), income from the sale of goods produced in whole or in part within and sold without the United States is to be treated as derived partly from sources without the United States, but that income derived from the purchase of goods within and their sale without the United States is to be treated as derived entirely from the country in which sold.

not only that the rate of taxation should vary in different countries, but that there should be some laps and some gaps in the adjustment of the revenue laws of the various countries to foreign trade. It may happen for a time that income from some transactions may escape all taxation, while other income may have to bear its tax in more than one country. But a nation that attempts to reach out too far in the direct or indirect taxation of foreign trade may invite retaliation and reprisal. So long as the tax on American corporations is measured by net income actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for any particular contracts, even if it could be assumed that foreign competitors were subject to no equivalent taxation by their own governments. Clearly, however, such a handicap or discrimination does not make the classification such a grave abuse or oppression as to condemn the law as a denial of due process within the Fifth Amendment. For to bring it within this condemnation it must be, as the Supreme Court says in Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 24, 25, 36 Sup. Ct. 236, 244 (60 L. Ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713):

[fol. 16] "A case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the fifth amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

In La Belle Iron Works v. United States, 256 U. S. 377, 392, 393, 41 Sup. Ct. 528, 532 (65 L. Ed. 998) the court again points out:

"The Fifth Amendment has no equal protection clause, and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by article 1, sec. 8. * * * The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the states under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation. * * * The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. * * * If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the tests applied."

Defendant's motion for judgment on the pleadings is granted.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING BILL OF COMPLAINT—Filed Feb. 29, 1924

Defendant herein having moved for judgment dismissing the amended complaint herein upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action and for such other and further relief as to the Court in the premises may seem proper, and said motion having duly come to be heard:

Now, after hearing Thomas J. Crawford, Assistant United States Attorney for the Southern District of New York, of counsel for defendant, in support of said motion and Franklin Grady, Esq., of counsel for plaintiff in opposition thereto, and due deliberation having been had thereon, on motion of William Hayward, United States Attorney for the Southern District of New York, attorney for defendant, it is

Ordered that the said motion be and the same hereby is in all respects granted, and it is

Further ordered that defendant have final judgment against plaintiff herein dismissing the amended complaint upon the merits and for his costs to be taxed.

Julian W. Mack, United States Circuit Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed March 1, 1924

Defendant's motion for judgment dismissing the amended complaint herein upon the ground that said amended complaint herein did not state facts sufficient to constitute a cause of action, having duly come on to be heard before the Honorable Julian W. Mack, United States Circuit Judge, at a stated term of this Court held on the 29th day of February, 1924, and Thomas J. Crawford, Assistant United States Attorney for the Southern District of New York, of counsel for the defendant having been heard in support of said motion and Franklin Grady, Esq., of counsel for the plaintiff, having been heard in opposition thereto and due deliberation having been had thereon and the Court having handed down its memorandum on the said 29th day of February, 1924, granting said motion, and an order having been duly made and entered on the 29th day of February, 1924, granting defendant's motion and directing that the defendant have final judgment against the plaintiff herein dismissing the amended complaint upon the merits and for his costs to be taxed and the cost of said defendant having been taxed in the sum of $11.10.

Now, on motion of William Hayward, United States Attorney for [fol. 19] the Southern District of New York, attorney for defendant, it is

Adjudged that the amended complaint herein be and it hereby is dismissed upon the merits and that defendant have and recover of the plaintiff the sum of $11.10 his costs as taxed and that said defendant have execution against the plaintiff therefor.

Judgment signed this 1st day of March, 1924.

Alex. Gilchrist, Jr., Clerk.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed March 5, 1924

The petition of National Paper & Type Company, the Plaintiff herein, respectfully shows that on or about the 1st day of March, 1924, judgment was duly entered in this Court in this cause in favor of the Defendant and against the Plaintiff dismissing the complaint, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this Plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Lord, Day & Lord, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 5, 1924

Now comes the Plaintiff above named and files the following assignment of errors upon which it will rely in its appeal from the judgment entered on the first day of March, 1924.

First. That the Court erred in holding that the amended complaint did not state facts sufficient to constitute a cause of action; and in granting the Defendant's motion for judgment on the pleadings.

Second. That the Court erred in holding that the Congress of the United States may arbitrarily tax the net income or profits of the Plaintiff accruing or derived from the business of purchasing and exporting personal property from the United States for sale without the United States by the Plaintiff when the like net income or profits of foreign corporations, accruing or derived from the like business of exporting transacted by said foreign corporations within the United States under the protection of the United States with capital invested within the United States in said business by said foreign corporations, is wholly exempted from like taxation [fol. 22] by the Congress of the United States.

Third. That the Court erred in holding that the alleged tax imposed by the Congress of the United States on the net income or profits of the Plaintiff accruing or derived from the business of exporting personal property purchased by the Plaintiff within the United States for sale without the United States by the Plaintiff was not the confiscation or taking of Plaintiff's property in violation of the Constitution of the United States when the like net income or profits of foreign corporations accruing or derived from the like business of exporting transacted within the United States by said foreign corporations with capital invested within the United States by said foreign corporations, under the same or like circumstances and conditions and in the same or like manner as the Plaintiff transacted the said like business of exporting, was wholly exempted from like taxation by the Congress of the United States.

Fourth. That the Court erred in holding that the tax imposed by the Congress of the United States upon the net income of profits of the Plaintiff accruing or derived from the business of exporting transacted within the United States by the Plaintiff did not impede and discourage the Plaintiff's said business of exporting and thereby impose upon said business of exporting a direct and immediate burden in violation of the Constitution of the United States when the like net income or profits of foreign corporations accruing or derived from the said like business of exporting transacted within [fol. 23] the United States by said foreign corporations with capital invested in said like business within the United States by said foreign corporations was wholly exempted by the Congress of the United States from like taxation.

Wherefore, Plaintiff-Appellant prays that the said judgment may be reversed and the motion granted to dismiss the amended complaint overruled, and for such other and further relief as to the Court may seem just and proper.

Lord, Day & Lord, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

STATEMENT RE BOND ON APPEAL

The plaintiff furnished a bond in the sum of $250, conditioned for the prosecution by it of the Writ of Error herein.

The surety on said bond is American Surety Company.

Said bond was approved on March 5, 1924, by the Hon. Wm. Bondy, D. J., and filed with the Clerk of the District Court of the United States for the Southern District of New York on March 5, 1924.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed March 5, 1924

This 5th day of March, 1924 comes the Plaintiff by its attorneys, and files herein and presents to the Court its petition praying for the allowance of writ of error and assignment of errors intended to be urged by it, praying also that a transcript of record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the Plaintiff giving bond according to law in the sum of Two Hundred and Fifty Dollars ($250.00) which shall operate as a supersedeas bond.

Wm. Bondy, D. J.

[fol. 26] CITATION—In usual form, showing service on William Hayward; filed March 7, 1924; omitted in printing

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[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing pages, numbered 1 to 26, inclusive, contain a true and complete transcript of the record and proceedings had in the United States District Court for the Southern District of New York, in the cause of National Paper & Type Company, Plaintiff in Error, against Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, De-

fendant in Error, as the same remain of record and on file in the office of the Clerk of said Court.

Dated New York, March 7th, 1924.

Lord, Day & Lord, Attorneys for Plaintiff in Error. Wm. Hayward, United States Attorney, Attorney for Defendant in Error.

[fol. 28] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered 1 to 27 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of National Paper & Type Co., Plaintiff in error, against Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, Defendant in error, as the same remain of record and on file in said office as agreed upon by the parties.

In testimony whereof I have caused the seal of said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 7th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-Four and of the Independence of the United States the One Hundred Forty-Eighth.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of N. Y.)

[fol. 29] [Endorsed:] L. 32/383. United States District Court, Southern District of New York. National Paper & Type Company, Plaintiff, against Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, Defendant. Transcript of Record. Lord, Day & Lord, Attorneys for Plaintiff in Error, 25 Broadway, New York.

Endorsed on cover: File No. 30,187. S. New York D. C. U. S. Term No. 320. National Paper and Type Co., plaintiff in error, vs. Frank K. Bowers, collector of internal revenue for the second district of New York. Filed March 11th, 1924. File No. 30,187.

No. 320.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

NATIONAL PAPER AND TYPE CO.,
Plaintiff-in-Error,

vs.

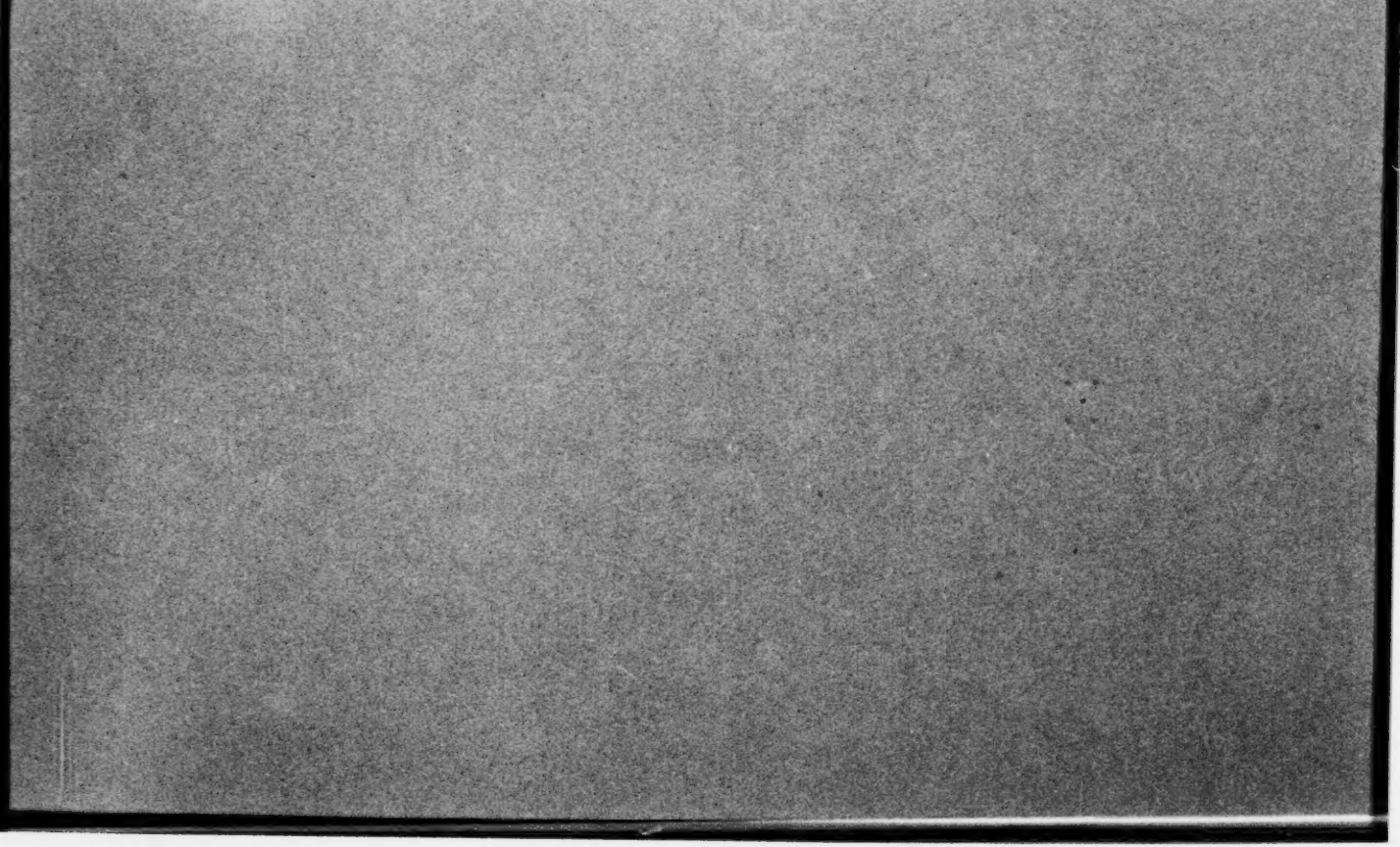
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

FRANKLIN GRADY,
Attorney for Plaintiff-in-Error.

P. J. McCUMBER,
HOMER SULLIVAN,
Of Counsel.

The Rotary Print Job Printing Office, Inc., 154 Fulton St., New York, N. Y.



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CASES CITED.

CONSTITUTION, STATUTES, OPINIONS, REPORTS, &c., CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 320.

NATIONAL PAPER AND TYPE CO.,
Plaintiff-in-Error,

vs.

FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The questions involved come to this Court upon a writ of error to the District Court of the United States for the Southern District of New York. The plaintiff in error is a New Jersey corporation which has its prin-

cipal place of business in the city of New York, in the State of New York, in the United States, and during all the times stated in the complaint was and still is engaged within the United States in the business of exporting with capital invested in said business, that is to say, the purchase of personal property within the United States by said plaintiff in error, and the exportation and sale of said personal property without the United States by said plaintiff in error.

In such business of exporting, the said plaintiff in error was, and is, necessarily subject to the competition of corporations organized, authorized or existing under the laws of foreign countries, and under the laws of Porto Rico and the Philippine Islands, which by the terms of the Revenue Act of 1921 hereinafter mentioned were denominated foreign countries (not included in the term 'United States') and whose corporations were classified as foreign corporations; which said foreign corporations at all times stated in the complaint, and before and since, were and are, similarly engaged within the United States in the like business of exporting, that is to say, the purchase of personal property within the United States by such foreign corporations and the exportation and sale of such personal property without the United States by such foreign corporations. And, as stated in the complaint, such foreign corporations have invested under the protection of the United States large amounts of capital within the United States in such business of exporting, which business of exporting was and is transacted by

said foreign corporations under the same or like circumstances and conditions and in the same or like manner as the said plaintiff in error transacted the said like business of exporting.

The cause of action stated in the complaint relates to the assessment and collection from the plaintiff in error of the income tax imposed with respect to the last one-fourth part of plaintiff in error's fiscal year ended March 31, 1921, that is, for the quarterly or three-months period of said fiscal year consisting of the months of January, February and March in the year 1921, under the provisions of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921 (42 Stat. at L. Chap. 136, Sections 205 and 230, pp. 227 *et seq.*). In all of the said fiscal year, the plaintiff in error's business consisted entirely of exporting, as stated above, and its net income or profits for said fiscal year accrued or were derived from said business of exporting so carried on.

The plaintiff in error was notified by the defendant in error that, upon the basis of the return which had been filed by the plaintiff in error for its said fiscal year, as required by law, it was assessed and compelled to pay to the defendant in error the sum of $16,796.31, as and for the tax imposed by the said Act of Congress together with the Act of Congress approved February 24, 1919, known as the Revenue Act of 1918 (40 Stat. at L. Chap. 18, Sections 230 and 301, pp. 1057 *et seq.*), upon all of the net income or profits of its said fiscal year, and that payment must be made of said sum in

quarterly payments beginning on or before June 15, 1921, unless paid in full on or before that date, said notice being the usual notice under the Income Tax Law. The plaintiff in error thereupon paid to the defendant in error the said amount of said assessment in four quarterly payments, of which $4,203.91 paid on March 15, 1922 is the payment to which said cause of action relates; and said plaintiff in error accompanied said payment with a written protest that the said amount of tax was illegally assessed and collected, in violation of the provisions of the Constitution of the United States. The first three of said quarterly payments were governed by said Revenue Act of 1918, and the last or fourth of said payments, to which said cause of action relates, was governed by said Revenue Act of 1921. Thereafter, on or about December 6, 1922, the plaintiff in error made to the Commissioner of Internal Revenue a claim for refund of the taxes so paid under protest, as aforesaid, on the ground that said taxes were illegally assessed and collected, inasmuch as the taxes were assessed and collected in violation of the provisions of the Constitution of the United States.

On February 19, 1924, more than six months after the filing of said claim for refund, as provided by Section 1318 of said Revenue Act of 1921, the plaintiff in error sued the defendant in error in the District Court for the recovery of the amount of $3,999.08 of said payment of tax on March 15, 1922, on the ground that the assessment and collection of said amount were in violation of the Fifth Amendment of the Constitution of the

United States, and in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States (Amended complaint appears in the Record, pp. 2-5). The defendant in error moved to dismiss the amended complaint as not stating facts sufficient to constitute a cause of action, and demanded judgment dismissing the amended complaint (Record, p. 5).

The motion to dismiss the amended complaint was granted by the District Court on the authority of National Paper & Type Company *v.* Edwards, 292 Fed. 633. The opinion of the District Court in that case appears in the Record at pages 6 to 8.

Assignment of Errors.

The errors assigned are:

FIRST: That the Court erred in holding that the amended complaint did not state facts sufficient to constitute a cause of action; and in granting the Defendant's motion for judgment on the pleadings.

SECOND: That the Court erred in holding that the Congress of the United States may arbitrarily tax the net income or profits of the Plaintiff accruing or derived from the business of purchasing and exporting personal property from the United States for sale without the United States by the Plaintiff when the like net income or profits of foreign corporations, accruing or derived from the like business of exporting transacted by said foreign corporations within the United States under the

protection of the United States with capital invested within the United States in said business by said foreign corporations, is wholly exempted from like taxation by the Congress of the United States.

THIRD: That the Court erred in holding that the alleged tax imposed by the Congress of the United States on the net income or profits of the Plaintiff accruing or derived from the business of exporting personal property purchased by the Plaintiff within the United States for sale without the United States by the Plaintiff was not the confiscation or taking of Plaintiff's property in violation of the Constitution of the United States when the like net income or profits of foreign corporations accruing or derived from the like business of exporting transacted within the United States by said foreign corporations with capital invested within the United States by said foreign corporations, under the same or like circumstances and conditions and in the same or like manner as the Plaintiff transacted the said like business of exporting, was wholly exempted from like taxation by the Congress of the United States.

FOURTH: That the Court erred in holding that the tax imposed by the Congress of the United States upon the net income or profits of the Plaintiff accruing or derived from the business of exporting transacted within the United States by the Plaintiff did not impede and discourage the Plaintiff's said business of exporting and thereby impose upon said business of exporting a

direct and immediate burden in violation of the Constitution of the United States when the like net income or profits of foreign corporations accruing or derived from the said like business of exporting transacted within the United States by said foreign corporations with capital invested in said like business within the United States by said foreign corporations was wholly exempted by the Congress of the United States from like taxation.

The foregoing assignments of error amount substantially to the single contention that the lower court should have denied the motion to dismiss the amended complaint and should have made an order to that effect.

Contention of Plaintiff in Error.

The alleged tax, imposed upon the net income of the plaintiff in error accruing from its business of exporting, for the recovery of which this action was brought, was, with respect to the entire exemption therefrom of the like net income accruing likewise to foreign corporations transacting the like business of exporting within the United States with capital invested in the United States, a hostile discrimination and confiscation of property forbidden by the "due process of law" provision of the Fifth Amendment of the Constitution of the United States; and was also a burden on and impediment to the exporting business of the plaintiff in error in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States.

Outline of Argument.

First.

The assessment and collection of the alleged tax on the plaintiff in error's net income or profits accruing or derived from its business of exporting transacted within the United States with capital invested within the United States was not the exertion of taxation but the confiscation or taking of plaintiff in error's property in violation of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be "deprived of life, liberty or property without due process of law", inasmuch as under the provisions of the law imposing said alleged tax upon the plaintiff in error, corporations organized under the laws of foreign countries were wholly or entirely exempted from the payment of like tax on like net income or profits accruing or derived from the like business of exporting transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which like business of exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the same or like manner as said plaintiff in error transacted the said like business of exporting within the United States, that is to say, the purchase of personal property within the United States and the exportation and sale of such personal property without the United States.

Second.

The alleged taxation imposed upon the said net income or profits of the plaintiff in error's said business of exporting transacted in the United States with capital invested in the United States by the plaintiff in error, constituted a direct burden on and impediment to the plaintiff in error's said business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State", inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of exporting transacted in the United States with capital invested in the United States by said foreign corporations was wholly exempted under the same law from like taxation.

ARGUMENT.

FIRST.

The assessment and collection of the alleged tax on the plaintiff in error's net income or profits accruing or derived from its business of exporting transacted within the United States with capital invested within the United States was not the exertion of taxation but the confiscation or taking of plaintiff in error's property in violation of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be "deprived of life, liberty or property without due process of law", inasmuch as under the provisions of the law imposing said alleged tax upon the plaintiff in error, corporations organized under the laws of foreign countries were wholly or entirely exempted from the payment of like tax on like net income or profits accruing or derived from the like business of exporting transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which like business of exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the same or like manner as said plaintiff in error transacted the said like business of exporting within the United States, that is to say, the purchase of personal property within the United States and the exportation and sale of such personal property without the United States.

The Law in the Case.

The law under which the defendant in error claimed to act in assessing and collecting the said alleged tax

from the plaintiff in error (Sections 230 and 205(*a*) of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921, 42 Stat. at L., Chap. 136) is in its pertinent parts as follows:

> "Sec. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:
>
> (*a*) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and
>
> (*b*) For each calendar year thereafter, 12½ per centum of such excess amount.
>
> Sec. 205. (*a*) That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period."

The provisions of this law which grant to foreign corporations engaged in the business of exporting in the United States exemption from the said alleged tax imposed upon the plaintiff in error, which exemption is

set forth in the amended complaint (Record, p. 3), are as follows:

> "Sec. 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (*b*) of section 212 or in section 226. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the computation shall also be made in the manner provided in section 217.
>
> "Sec. 233 (*b*) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by section 243 or 246) in the manner provided in section 217.
>
> "Sec. 217 (*e*) Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (*a*) and (*c*), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary * * * Gains, profits and income from (1) transportation or other services rendered partly within and partly without the United States, or (2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits

and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold."

The exemption thus given in the Revenue Act of 1921 to foreign corporations engaged in the business of exporting in the United States from the tax imposed by that Act on the like income of American corporations engaged in like business was a continuation of the like exemption given to the foreign corporations by the preceding Act of Congress, approved February 24, 1919, known as the Revenue Act of 1918 (40 Stat. at L. Chap. 18); but was a change in this respect from the former income-tax laws of 1894, 1909 (Corporation Tax Law), and 1913, all of which taxed such income of the foreign corporations likewise and equally with like income of the American corporations.

The corresponding provisions of the Revenue Act of 1918 imposing taxes, and granting exemption to foreign corporations, are as follows:

"Section 230. (*a*) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and

(2) For each calendar year thereafter, 10 per centum of such excess amount."

* * * * *

"Section 301 (*a*) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket.

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital:

Third Bracket.

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(*b*) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (*c*) of this section) a tax equal to the sum of the following:

First Bracket.

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket.

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital."

* * * * *

"Sec. 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (*b*) of section 212 or in section 226.

"Section 233. (*a*) That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in section 213, except that:

* * * * *

(*b*) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States."

Like and Equal Treatment under Prior Income Tax Laws.

All the income-tax laws of the United States enacted during the years prior to the European War, and following the Act of 1866, provided that the tax, at the same rate as for domestic corporations, should be imposed upon foreign corporations with respect to income accruing from "business transacted and capital invested within the United States"; and under such provisions such foreign corporations were obliged to make return of, and pay the tax upon, their income derived from the purchase or production of personal property in the United States and the exportation and sale of such property in foreign countries.

The provisions of our laws of 1894, 1909 and 1913, under which like and equal taxation was imposed upon the foreign corporations, were as follows:

In the Act of August 27, 1894 (28 Stat. at L., Chap. 349, pp. 553, 555):

> "Sec. 31. Any nonresident may receive the benefit of the exemptions heretofore provided for by filing with the deputy collector of any district a true list of all his property and sources of income in the United States and complying with the provisions of section twenty-nine of this act as if a resident. In computing income he shall include all income from every source, but unless he be a citizen of the United States he shall pay only on that part of the income which is derived from any source in the United States. In case such nonresident fails to file such statement, the collector of each district shall collect the tax on the income derived from

property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such nonresident shall be liable to distraint for tax; Provided, that nonresident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against nonresident persons.

Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, savings institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies or associations doing business for profit in the United States no matter how created and organized, but not including partnerships."

In the Act of August 5, 1909 (36 Stat. at L., Chap. 6, pp. 112, 113):

"Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any

State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends, upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

In the Act of October 3, 1913 (38 Stat. at L., Chap. 16, p. 172):

"G. (*a*) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-

stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year."

Foreign Corporations Carrying on Exporting Business in the United States.

It is well known and officially admitted that foreign corporations are, and were, engaged within the United States in the business of exporting, and that such foreign corporations have invested under the protection of the United States large amounts of capital in such business of exporting; and that under the said Revenue Act of 1921 such foreign corporations were wholly exempted from the payment of tax on the net income or profits derived therefrom. The plaintiff in error during the time said Revenue Act of 1921 remained in effect necessarily competed with such foreign corporations in transacting the like business of exporting within the United States and, as stated in the complaint, such business of exporting was transacted by such foreign corporations under the same or like circumstances and conditions, and in the same or like manner, as the plaintiff in error transacted the like business of exporting within the United States. That is to say, the plaintiff in error and such foreign corporations purchased personal property from manufacturers or merchants within the

United States; paid for such personal property with capital invested within the United States; had such personal property delivered to them within the United States; negotiated the contracts for the transportation of such personal property from the United States to foreign countries; sold such personal property to buyers in foreign countries through agents employed for that purpose; and received within the United States the net income or profit derived from said business. The discrimination against the plaintiff in error was therefore made to depend upon difference in nationality or allegiance of the corporations with which it competed in such business of exporting within the United States.

In a country of great natural resources like the United States, with a stable and enlightened Government guaranteeing security for life, liberty and property, it was natural and inevitable that a very large foreign trade would follow the development of such resources, and that foreign commercial interests, attracted by this great opportunity, would invest their capital in the United States and compete with American citizens and corporations in supplying the demand of foreign countries for American products. Under our Constitution and laws, and in accordance with rights guaranteed by treaties negotiated by the United States with practically all the commercial nations of the world, the citizens and corporations of these foreign countries have been freely admitted into the United States and allowed to engage in any lawful business or occupation on the same terms and conditions as American citizens

and corporations, and hence they enjoy, under the protection of the United States, all the commercial rights and privileges conferred by our national and state constitutions and laws equally with our own citizens and corporations.

If the Revenue Act of 1921 had imposed tax on the income of these foreign corporations transacting the business of exporting within the United States, deductions from gross income under that Act would have included the commissions or salaries paid to their agents in foreign countries for effecting the sale of the exported property in the foreign countries, as well as the taxes paid by such agents for account of such foreign corporations, and hence all of the net income received by them within the United States was earned by such foreign corporations under the protection of the United States from business transacted and capital invested within the United States.

That this exemption from tax was not granted by Congress for the relief of foreign corporations in foreign countries importing personal property from the United States pursuant to contracts of purchase negotiated by the agents of such corporations in the United States, is well known. Such foreign importing corporations frequently employ such agents in the United States to negotiate such contracts of purchase with American merchants. These agents may be aliens or citizens of the United States. If aliens they were required, like American citizens, to pay tax under the Revenue Act of 1921 on their

net income derived from their personal services. After such contracts are negotiated, it is the practice for such American merchants selling the goods to export the property on designated vessels or lines for delivery to the foreign importing corporations in the foreign countries. Payment for property so exported is customarily obtained by such merchants through bills of exchange drawn on the foreign importing corporations through banks or other financial agencies in the United States, and, until such bills of exchange are paid or accepted by, and the bills of lading under which the property was exported from the United States delivered to, such corporations in the foreign countries, the title to the property remains with the American merchants. It is therefore manifest that such sales by American merchants to foreign importing corporations in foreign countries, arising from contracts of purchase negotiated by such agents in the United States, are not completed until after arrival of the property in the foreign country. Under such circumstances no capital is invested within the United States by such foreign importing corporations, and since the export commerce within the United States is wholly transacted by such American merchants it is clear that the net income derived from the resale of such property in foreign countries by such foreign importing corporations there is beyond the jurisdiction of the United States. If, after such foreign corporations have had such property delivered to them in the foreign country, they should export from there and sell such property through agents in

other foreign countries, receiving payment for such sales in their own country, the status of such foreign corporations in such foreign country would correspond to that of foreign corporations residing in the United States and transacting the like business of exporting within the United States, under the protection of the United States, with capital invested in such business by such corporations within the United States.

With reference to the activities of both foreign and domestic corporations in connection with the business of purchasing personal property within and selling such property without the United States, it is well known that such activities include the maintenance of offices in the United States fully equipped to carry on the business of exporting; the erection or leasing of warehouses, elevators, etc., for the storage, repacking, and grading of personal property purchased to supply the demand of foreign countries; the leasing of agricultural, timber and mineral lands, the products of which they sell in foreign countries; and the leasing of wharves or docks for use by the vessels which they charter in the United States for the transportation of such personal property to foreign countries.

The Attorney General's Opinion on the Like Exemption of Foreign Corporations under the Revenue Act of 1918.

On November 3, 1920, the Attorney General of the United States sent to the Secretary of the Treasury an opinion which construed Section 233 (*b*) of the Revenue Act of 1918 (see page 15, *supra*). This opinion

(32 Op. Atty. Genl. 336), was promulgated by the Secretary of the Treasury for the information and guidance of the collectors of internal revenue and others concerned, and its pertinent parts, which governed the application of the tax in the case of the plaintiff in error, under Sections 217 and 233 of the Revenue Act of 1921, are as follows:

"DEPARTMENT OF JUSTICE,
WASHINGTON, November 3, 1920.

SIR:

I have the honor to acknowledge receipt of your letter of August 12, 1920, requesting an opinion as to whether, under the Revenue Act of February 24, 1919, in the five following cases, the foreign corporation or partnership derives income from sources within the United States, and, if so, what is the measure for determining the amount of income derived from such sources.

(1) R. Burleigh and Sons, a corporation organized under the laws of Scotland, owns and operates two saw mills in the United States, one at Dermott, Arkansas, and the other at Dawson Springs, Kentucky. The mills saw logs into plank squares called 'handle blanks' and also roughly turn hammer handles. These products are all exported to Glasgow where they are finished at the home mill. In addition the manager of the American plant buys logs in the United States and exports them as such to Great Britain. No part of the products of the mills located in this country or of the logs purchased here is sold in the United States but the entire output is sold in Great Britain. The

plants and operations of the manager in the United States are conducted solely from funds sent to this country from the home office in Glasgow, Scotland, and no funds are sent to the home office from the American plants.

Section 213(*a*) of the Act of February 24, 1919, defines gross income as follows:

> Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> (*a*) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (*b*) of section 212, any such amounts

are to be properly accounted for as of a different period * * *

Section 233 (*b*) provides:

> In the case of a foreign corporation, gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States.

No income is derived from the mere manufacture of goods; before there can be income there must be sale; and there is no income from sources within the United States from goods manufactured here unless there is, in the language of Section 233(*b*), both 'manufacture and disposition of goods within the United States.' The obvious purpose of this section is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad, and without being disposed of by the owner in this country. I conclude, therefore, that when Burleigh & Sons manufacture or partially manufacture articles in this country but do not sell or dispose of them until they are taken to Scotland, there is no gross income from sources within the United States within the meaning of the Act.

As to the purchase and exportation of logs, since profits that may accrue from such transac-

tions are not specifically provided for in Section 233(*b*) if such gains or profits are gross income from sources within the United States, they must be so because they represent compensation from trades, businesses, commerce, etc., as enumerated in Section 213(*a*), which are carried on within the United States.

In Sulley *v.* Attorney General, 5 H. & N. 711 (2 B. T. C. 149), under a statute taxing the income of non-residents 'from any property whatever in the United Kingdom, or profession, trade, employment, or vocation exercised within the United Kingdom,' the facts are similar to those above stated. Sulley was a partner in a firm of general merchants and drapers carrying on business in both the United States and England. Sulley resided in England and the other partners in the United States. Sulley transacted the business of the firm in England, which consisted of purchasing goods in England and shipping them to the United States. No money was received in England except what was sent from the United States, and the profits of the business were made by the resale of goods at an increased price in the United States. The Court held that the liability to income tax attached only to such profits as came home to England as the share of Sulley, the partner resident there. The Lord Chief Justice said:

> The question is, whether there is a carrying on or exercise of the trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the subject matter of the statute. Wherever a merchant is established, in the course of his operations his

dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchaser of the goods to income tax. In the present case the defendant is a partner; but if the argument is well founded this American firm might be taxed in the same way if he had been merely an agent. It would be most impolitic thus to tax those who come here as customers. The subject of a foreign State, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed. But in the present case no profits are received by the firm, or exist in this country * * * The profits of the firm in America do not accrue in respect of any trade carried on in this country, but in respect of the trade carried on in New York, where the main business is conducted.

In State *ex rel.* Manitowoc Gas Co. *v.* Wisconsin Tax Commission, 161 Wis. 111, the Supreme Court of Wisconsin said:

If an income be taxed, the recipient thereof must have a domicile within the state, or the

property or business out of which the income issues must be situate within the state so that the income may be said to have a situs therein.

By a parity of reasoning I conclude that income which may accrue to Burleigh and Sons in England by sale of logs purchased in the United States is not income from sources within the United States.

* * * * *

(5) The Manchester Liners, Ltd., is a corporation organized under the laws of Great Britain, with its home office at Manchester, England, operating a line of freight steamships between Philadelphia, Pa., and foreign ports. The corporation has no office in the United States but consigns its steamships to Furness, Withy & Co., Ltd., at Philadelphia, who handles them as agents and brokers, together with steamships consigned to them by other owners. The agents see to the entry and clearance of each steamer and the discharge and loading of the cargo and supplies, collect such part of the freight as is prepayable in this country for the ocean carriage, deduct the amount of the agents' disbursements and charges for their services, and remit the balance to the steamship corporation at Manchester upon the departure of the vessel. Frequently a large part of the freight is not prepayable but is payable upon delivery of the goods at Manchester.

In an opinion rendered March 9, 1910, 28 Op. Atty. Genl. 211, Attorney General Wickersham decided that foreign steamship companies engaged in the business of transporting passengers, goods, and merchandise between ports in the United States and foreign ports, and maintaining passenger and

freight agencies in this country, are subject to the special excise tax provided in Section 38 of the Act of August 5, 1909, saying:

> * * * Their business consists entirely in transporting passengers and goods and merchandise between ports in this country and those of foreign countries, and receiving and discharging the same. Through agents located here all contracts and arrangements incident to such a business at this end of their lines are made, and all exports are delivered to their warehouses and loaded upon their vessels, and the passengers embark, while they are within the limits of the United States; and likewise while here their imports are unloaded and passengers from foreign ports disembark. If these companies do not transact business in the United States they transact no business in any foreign port, and their entire business is carried on upon the high seas. To such a conclusion I am unable to give assent.

A similar conclusion was arrived at in Erichsen *v.* Last, 8 Q. B. D. 414 (4 B. T. C. 422), which held that a cable corporation established at Copenhagen, with an agent and an office in London, with cables extending between England and Denmark, was carrying on trade in England from which profit arose on account of contracts entered into with persons in England to send messages from England to other countries. Brett, *L. J.*, said:

> * * * That which earns the profit, as I said at first, or that out of which they get the profit is the better phrase, is the money to be paid to them out of the contract, which contract is

made in England, and such contracts being habitually made by them in England, it seems to me, they carry on in England the trade or business of making such contracts. Therefore, it seems to me, that these people are properly said to be persons from whom this duty must be collected.

I am of the opinion that the Manchester Liners, Ltd. derives income from sources within the United States to the extent that it derives income from freight and passenger traffic originating within the United States.

Respectfully,

WM. L. FRIERSON,
Acting Attorney General.

To the Secretary of the Treasury."

It is important to note with reference to this opinion of the Attorney General that the decision of the English Court in Sulley *v.* Attorney General (*supra*), cited therein, holds that (see page 27, *supra*):

"Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place of business in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. * * * The subject of a foreign State, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Sim-

ply by the provision that whosoever carries on the business and receives the profits here shall be assessed."

It is thus evident that if American corporations had been engaged in the business of exporting in Great Britain, with capital invested in such business under the protection of the laws of that country, and in the transaction of such business had purchased or manufactured and exported goods; had sold such goods through agents in foreign countries; and received the proceeds of such sales within Great Britain in like manner as foreign corporations receive the proceeds within the United States from the business of exporting transacted by them within the United States, such American corporations would undoubtedly have been required to pay tax to Great Britain on the net income or profits derived from such business in Great Britain.

Under the Revenue Act of 1921 and all income tax laws enacted prior thereto, citizens of foreign countries residing within the United States and engaged in the business of exporting were required to pay tax on net income or profits derived therefrom, which business was transacted by them in the same or like manner as foreign corporations transacted the like business of exporting within the United States. The justification for the imposition of such tax must be found in the fact that such business was transacted by such resident alien individuals within the United States, and under the protection of the United States, and certainly no distinction can be drawn between such

business transacted by resident alien individuals and like business transacted by foreign corporations residing within the United States. That a corporation may reside in a country other than that in which it was organized, and from which it received its charter or franchise, is shown by the following citations from decisions by United States and English courts:

In St. Clair *v.* Cox (106 U. S. 350), this Court said (on p. 355):

> "* * * Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.
>
> All there is in the legal residence of a corporation in the State of its creation, consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should

not be equally deemed to represent it, in the States for which they are respectively appointed, when it is called to legal responsibility for their transactions."

In Zambrino *v.* Galveston, H. & S. A. Ry. Co. (38 Fed. 449), the Court said (on p. 453):

> "The English doctrine as to the competency of an American corporation to acquire a residence in England is stated by Justice Blackburn in Newby *v.* Fire Arms Co. In that case the defendant corporation had a place of business in England and there *de facto* carried on its business, just as an English corporation might have done, but the principal place of business and head office were in America. The Court said:
>
> 'Such a corporation does, for many purposes, reside both in England and in its own country. * * * And in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there. L. R. 7 Q. B. 293, I Moak, Eng. R. 326, 327.'"

In the opinion of the Lord Chancellor in DeBeers Consolidated Mines Ltd. *v.* Howe (1906), 5 B. T. C. 198, it was said by the English court:

> "A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company."

And in Goerz *v.* Bell (1904), 2 K. B. 136, 150, the English court said:

> "Although the company, by getting itself registered in the South African Republic, undoubtedly desired, so far as that term is applicable to a company before incorporation, to take advantage of the laws of that country, yet, having regard to the constitution of the company as appearing from its articles, I can see nothing to prevent it after incorporation from residing elsewhere, either instead of, or as well as, in the South African Republic, and I think that the company did reside elsewhere. Of course it, or its promoters, intended to get the benefit of the law of the Transvaal, and did get it and no doubt the intention was that it should be a 'Boer' and not an 'Uitlander' company, and it got very substantial advantages in its operations by reason of its being incorporated there instead of in England; it was so incorporated on purpose. These facts show, in my opinion, that it was from the very first intended that the operations of the company might be mainly outside the Transvaal, and in fact they were mainly outside that country. Upon the dicta to be found in past decisions, I think this company must be taken to be resident in the United Kingdom."

In *Corpus Juris,* Vol. 14A, Sec. 3945, it is said (on p. 1240):

> "A corporation which seeks to establish a business domicile in a State other than that of its creation must take that domicile as individuals are always expected to do, subject to the responsibilities

> and burdens imposed by the laws which it finds in force there. It becomes amenable to the laws of the latter State and to the process of its courts, upon the same principle, and to the same extent as natural persons or domestic corporations."

It is to be noted also that Congress recognizes that foreign corporations transacting business within the United States are *resident* in the United States, by referring in paragraph 1 of Section 217 (*a*) of the Revenue Act of 1921 to such foreign corporations as "resident foreign corporations".

It will be observed that the Attorney General in his opinion of November 3, 1920, with respect to the Manchester Liners, Ltd., referred to (see pp. 29, 30, *supra*) an earlier opinion rendered by the Attorney General on March 9, 1910, under Section 38 of the Act of Congress, approved August 5, 1909 (36 Stat. at L., p. 112) which provided for an excise tax "with respect to the carrying on or doing business" in a corporate capacity, equivalent to one per centum of the net income received from the transaction of such business. That law provided (36 Stat. at L., p. 113) that foreign corporations should pay tax at the same rate as domestic corporations upon the amount of net income received from business transacted and capital invested within the United States (see page 18, *supra*).

The Attorney General could not apply to the foreign steamship companies transacting business in the United States the exemption granted by Section 233(*b*) of the Revenue Act of 1918 to foreign corpora-

tions, because by the terms of that section the exemption was limited to foreign corporations which manufactured or acquired goods in the United States and disposed of the same in foreign countries. The contrast between the taxation of the foreign steamship companies and the exemption of the foreign manufacturing and mercantile companies under this Act illustrates the lack of reason for the discrimination in favor of foreign exporting companies in that and the following Act, and the peculiarly hostile character of the discrimination against the plaintiff in error under the Acts of 1918 and 1921.

It will also be observed that under Sections 217 and 233 of the Revenue Act of 1921, which are continued without change in the Revenue Act of 1924, foreign corporations engaged in the business of transporting passengers and freight between ports in the United States and foreign ports are only required to pay tax on such part of the income as may be derived from the transportation of such passengers and freight rendered within the United States.

Treaty Rights Under Which Foreign Corporations Carry on Business in the United States.

An illustration of the rights granted by treaties of the United States to aliens (including alien corporations) to carry on business in the United States, and of the protection given to them in their business enterprises in this country by the Constitution of the United States,

is given in the opinion of this Court in the case of Terrace *v.* Thompson, decided November 12, 1923 (United States Supreme Court Advance Opinions 1923-1924, No. 3, p. 35), which dealt with the contention that certain provisions of the Anti-alien Land Law of California were in conflict with the due process and equal protection clauses of the 14th Amendment and with the treaty between the United States and Japan of February 21, 1911 (37 Stat. at L., 1504). This Court, after declaring again that the Constitution of the United States protects the alien inhabitant of the United States "in his right to earn a livelihood by following the ordinary occupations of life" (p. 37), and that "alien inhabitants of a state, as well as all other persons within its jurisdiction, may invoke the protection" of the due process and equal protection clauses of the 14th Amendment (p. 38), quoted (p. 40) from the provisions of the aforesaid treaty with Japan as follows:

> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is well known that under these treaty provisions and Constitutional protection a considerable number of Japanese corporations are actively engaged within the United States in the business of exporting, and are competing with American corporations engaged in like business, and that some of these Japanese corporations have employed capital in such business in the United States to the extent of many million of dollars, with extensive stores, warehouses, etc. It is also well known in commercial circles that such Japanese, with other Asiatic or foreign, corporations now carry on a large part of the foreign commerce of the United States with Asiatic countries, having been greatly assisted by the total exemption from the payment of tax on net income or profits derived from their export trade.

Similar treaties, with similar provisions permitting the corporations of foreign countries to lease or acquire factories, warehouses, etc., and to carry on any kind of manufacturing or commercial business in the United States on the same terms as American corporations, have been made between the United States and practically all the other civilized countries in the world; and under the decisions of this Court herein referred to it is clear that if such treaties had provided, as the Act of Congress in the case of the plaintiff in error provides, that corporations organized under the laws of such foreign countries should be favored by entire immunity from taxation or preferential treatment in export trade as compared with American citizens or corporations, *such provision in such treaties would be contrary to due process of law.*

Disadvantages Encountered by American Corporations in Export Trade.

In further illustration of the competitive disadvantages to which our American corporations engaged in foreign trade were subjected by the discriminating taxation which is complained of in the case of the plaintiff in error, it is to be noted that Canada and Great Britain, with whose people our exporters must compete in world markets, give to their corporations exemption from their income taxes with respect to trade outside of their own countries. For example, Canada, in her Income Tax Law (7 and 8 Geo. V., c. 28, as amended in 1918) exempted from tax

> "the income of incorporated companies whose business and assets are carried on and situated entirely outside of Canada."

Similarly, it was decided in Great Britain (Egyptian Hotels, Ltd. *v.* Mitchell (1915) H. L.) that under the British Income Tax Law a British corporation which had amended its Articles of Association so as to permit its business in Egypt to be managed by directors there, and had so managed and directed its business there, was not doing business in the United Kingdom or due to pay income tax to the United Kingdom with respect to its Egyptian business, notwithstanding that the corporation had a General Board of Directors in England and raised its capital there.

The effect of these and other similar provisions by other great commercial nations whose corporations compete with our own in the difficult struggle for foreign trade, is that such foreign corporations, doing business in the United States and producing or purchasing commodities here and selling them in any part of the world outside of their own countries, have paid no income tax to their home governments on the proceeds of such trade. Such proceeds of such trade came back to such foreign corporations in the United States undiminished by such taxation either here or abroad, except that which was paid in the countries where the goods were sold, increasing, of course, their working capital and financial resources here, while like proceeds of like trade by American corporations were compelled to pay the heavy taxes of the Revenue Acts of 1918 and 1921.

Cooley on the Restrictions Imposed by the "Due Process of Law" Provisions.

In Judge Cooley's works on Taxation and Constitutional Limitations the principles settled by the courts with respect to the meaning and purpose of the constitutional guarantee of "due process of law" as applied to taxation have been very clearly stated, and the following citations from Judge Cooley's works set forth the restrictions imposed by the "due process of law" provisions of the Constitution.

In Cooley on Taxation (Third Edition), in the chapter entitled "Taxation and Protection Reciprocal", it is said (Vol. I, p. 23):

"Alienage itself does not work an exemption if the alien is domiciled in the country, so far at least as he has property there to be protected by its laws; and tangible property in the country, as stock in trade or manufacture, or for sale, is taxable irrespective of the residence or allegiance of owners."

In the chapter entitled "Equality and Uniformity in Taxation" it is said (Vol. I, pp. 259-261):

"It has already been stated that inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax exclusively on merchants' goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a particular portion of the taxing district or because the

persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of moneys were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

In Cooley's Constitutional Limitations it is said (on pp. 707 and 708):

"Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike protected, so all alike should bear the burden, in proportion to the interests secured. Taxes by the poll are justly regarded as odious and are seldom resorted to for the collection of revenue; and when taxes are levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions."

And (on page 723):

"To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that

paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by an enlightened or responsible government."

The Meaning of Due Process of Law as Defined by the Supreme Court.

In Dent v. West Virginia (129 U. S. 114) this Court very clearly defined the meaning of the "due process of law" clause, which appears in both the Fifth and Fourteenth Amendments of the Constitution. The Court said (on pp. 121-124):

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

* * * * * *

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will

embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land'. *In this country, the requirement is intended to have a similar effect against legislative power,* that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation upon the subjects to which it relates,* and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case. *The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens."* (The italics are ours.)

And this Court has determined also that legislation is arbitrary and capricious when it makes a discrimination depending on nationality or allegiance. In American Sugar Refining Co. *v.* Louisiana (179 U. S. 91) this Court had under consideration a statute of Louis-

iana imposing a license tax on the business of refining sugar and molasses, in which it was provided that the tax should not apply to "planters and farmers grinding and refining their own sugar and molasses". It was contended that this discrimination was in violation of the Fourteenth Amendment of the Constitution. The Court said (on p. 92):

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. *Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations,* or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws of the less favored classes." (The italics are ours.)

It is thus clearly established that discrimination in taxation which is made to depend on nationality or allegiance, as in the law in the case of the plaintiff in error, is arbitrary, oppressive or capricious, and hence in violation of the "due process of law" provision of the Fifth Amendment of the Constitution.

In Lappin *v.* District of Columbia (22 App. D. C. 68) the principles laid down by this Court with respect to the taking of property without due process of law were summed up and applied to the taxation imposed by the Act of Congress of July 1, 1902 (32 Stat.

at L., Chap. 1352) whereby general brokers in the District of Columbia paid a license tax of $250.00 per year, and brokers who were members of regular exchanges located outside of the District of Columbia and transacting a brokerage business therein paid a license tax of only $100.00 per year. The Court of Appeals of the District of Columbia in that case, citing Dent *v.* West Virginia (*supra*), held that this discriminating tax was in violation of the "due process of law" clause of the Fifth Amendment, and said:

> "The undoubted right to pursue any legitimate trade, calling or profession, subject only to such reasonable regulations in the interest of the public welfare as may be imposed upon all persons under like conditions, 'may, in many respects be considered as a distinguishing feature of our republican institutions.' Dent *v.* West Virginia, 129 U. S. 114. And, as was said in that case: 'The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors and cannot arbitrarily be taken away from them any more than their real and personal property can be thus taken. See also Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. and S. H. Co., 111 U. S. 757; Curry *v.* District of Columbia, 14 App. D. C. 423, 441.
>
> "If then, the direct prohibition of one person or class of persons from engaging in a calling that is open to others similarly situated is clearly beyond the legislative power, it must follow that the same purpose cannot be indirectly accomplished through

arbitrary taxation imposing upon one a burden greater than that to be borne by the others. As was said in Curry *v.* District of Columbia, 14 App. D. C. 423, 441: *'If discrimination is allowable, prohibition is allowable; and both are equally obnoxious to our free institutions. Indeed, to our ordinary sense of justice, discrimination is more obnoxious than prohibition.'"* (The italics are ours.)

* * * * *

"The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors upon less onerous terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefor within the prohibition of the 5th Amendment of the Constitution."

Aliens in the United States Protected by the Due Process of Law Provisions of the Constitution.

The principle expressed by the "due process of law" provision of the Fifth and Fourteenth Amendments was very clearly stated by this Court in Yick Wo *v.* Hopkins (118 U. S. 356). That case dealt with an ordinance of the city and county of San Francisco, which made it unlawful for any person or persons to carry on a laundry there without having first obtained the consent of a Board of Supervisors "except the same be located in a building constructed either of brick or stone". Although this ordinance appeared to be fair

on its face, yet its necessary effect, as stated by this Court, was to drive the Chinese laundries out of business, and hence the ordinance deprived the proprietors of such laundries of their property without due process of law.

In the statement of the case by Mr. Justice Matthews, it was said (on p. 362):

> "* * * And if, by an ordinance, general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the National Constitution, then the insertions of provisions to guard the rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the city and county of San Francisco, to the adjoining counties, beyond the convenient reach of customers, either of which results would be little short of confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result."

And in the opinion of the Court, delivered by Mr. Justice Matthews, it was said (on pp. 373, 374):

> "* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Applying the principle of this decision to the case of the plaintiff in error, an American corporation carrying on the business of exporting, it is clear that such a deprivation of property as was sought to be inflicted upon the Chinese by the discriminating ordinance of San Francisco has been inflicted contrary to due process of law upon the plaintiff in error in its business of exporting by the discrimination complained of in the case at bar. With its income from such business heavily taxed while the like income of foreign corporations and nonresident alien individuals engaged in such business is entirely exempted from tax, the effect is necessarily to drive such business out of the hands of the plaintiff in error or other American corporations so taxed, and into the hands of the exempted foreign corporations and alien individuals, with the loss by the American corporations of the capital invested by them in such business.

In the opinion in Brushaber *v.* Union Pacific R. R. Co. (240 U. S. 1), delivered by Mr. Chief Justice White, this Court said (on p. 24):

> "So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that *this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*"

It is submitted that it would be impossible to draft a law taxing income which would be more *"wanting in basis for classification"* or wherein any more *"gross and patent inequality" in taxation would result* than that which is complained of by the plaintiff in error in the case at bar. Compared with the competing foreign corporations the occupation is the same (the business of

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exporting carried on in the United States); the circumstances and conditions under which this competition is carried on are identical; and hence it would be impossible to discriminate against the plaintiff in error in this case without basing the classification on *nationality or allegiance*, or something equally arbitrary and capricious, *which is precisely what this Court has said Congress cannot do without thereby taking property contrary to due process of law.*

The Fundamental Principle of Equality of Application of the Law.

In Truax *v.* Corrigan (*267* U. S. 334) this Court, speaking by Mr. Chief Justice Taft, said (on p. 332):

> "The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal government, while the equality clause does not appear in the 5th Amendment, and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Hurtado *v.* California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. It, of course, tends to

> secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. *Our whole system of law is predicated on the general fundamental principle of equality of application of the law.* 'All men are equal before the law'; 'This is a government of laws, and not of men'; 'No man is above the law',—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws." (The italics are ours.)

It is submitted that this "general fundamental principle of equality of application of the law", has been violated in the case of the plaintiff in error, since under the Revenue Act of 1921 it was taxed on income from its business of exporting when foreign corporations engaged in like business within the United States, under the same or like circumstances and conditions, were wholly exempted from like taxation.

In Hurtado v. People of California (110 U. S. 516) this Court said (on p. 536):

> "* * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations

by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In Smyth *v.* Ames (169 U. S. 466) this Court said (on p. 527):

"The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

In Hayes *v.* Missouri (120 U. S. 68) this Court said (on pp. 71, 72):

"The Fourteenth Amendment of the Constitution of the United States does not prohibit legislation which is limited either in the objects to which

it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier *v.* Connelly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' 113 U. S. 27, 32."

The Due Process of Law Principle Applied to Income Tax with Respect to Situation Like That of the Plaintiff in Error.

In Shaffer *v.* Carter (252 U. S. 37) this Court dealt with a law enacted by the State of Oklahoma taxing the net income of its residents from whatever source derived. With respect to nonresidents this law provided that a like tax "shall be levied, assessed, and collected and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on" therein by persons residing elsewhere.

It was contended by Shaffer, who resided in Illinois and carried on an oil business in Oklahoma, and shipped to, and sold in other States, or foreign countries, the products of such business, that because he resided in another State he was not liable for tax by Oklahoma on the

net income derived from such business. This Court in deciding that Oklahoma had jurisdiction to impose tax upon such net income held that Shaffer had no right to be favored by "discrimination or exemption" and hence, if the law had exempted from tax the income of non-residents engaged in such business in Oklahoma, the collection of tax from the residents of that State engaged in like business would have been contrary to the "due process of law" provision of the Fourteenth Amendment of the Constitution, and also would have imposed a direct burden on the like interstate commerce transacted by residents of Oklahoma.

The following citations from the opinion, delivered by Mr. Justice Pitney, set forth the reason of this principle of law, and clearly show that it is applicable to the case of the plaintiff in error.

This Court said (on pp. 49-51):

> "Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the state by action taken within its borders, either *in personam* or *in rem*, according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture or franchise, or the like; and the jurisdiction to act remains even though all permissible measures be not resorted to. Michigan Trust Co. *v.* Ferry, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; *Ex parte* Indiana Transp. Co., 244 U. S. 456, 457, 61 L. ed. 1253, 1255, 37 Sup. Ct. Rep. 717."

* * * * *

The contention that a state is without jurisdiction to impose a tax upon the income of nonresidents, while raised in the present case, was more emphasized in Travis *v.* Yale & T. Mfg. Co. decided this day (252 U. S. 60, post. 460, 40 Sup. Ct. Rep. 228), involving the Income Tax Law of the state of New York. There it was contended, in substance, that while a state may tax the property of a nonresident situate within its borders, or may tax the incomes of its own citizens and residents because of the privileges they enjoy under its Constitution and laws and the protection they receive from the state, yet a nonresident, although conducting a business or carrying on an occupation there, cannot be required through income taxation to contribute to the governmental expenses of the state whence his income is derived; that an income tax, as against nonresidents, is not only not a property tax, but is not an excise or privilege tax, since no privilege is granted; the right of the noncitizen to carry on his business or occupation in the taxing State being derived, it is said, from the provisions of the Federal Constitution.

This radical contention is easily answered by reference to fundamental principles. In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; *they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to*

governments to resort to all reasonable forms of taxation in order to defray the governmental expenses."

* * * * *

"In well ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

Income taxes are a recognized method of distributing the burdens of government, *favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay."* (The italics are ours.)

And (on pp. 52, 53):

"And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and resi-

dents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to nonresidents. (New Orleans *v.* Stempel, 175 U. S. 309, 320, *et seq.*, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; Bristol *v.* Washington County, 177 U. S. 133, 145, 44 L. ed. 701, 707, 20 Sup. Ct. Rep. 585; Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L. R. A. 1915C, 903, 31 Sup. Ct. Rep. 550), and sustaining Federal taxation of the income of an alien nonresident derived from securities held in this country (DeGanay *v.* Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524).

That a state, consistently with the Federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held or his occupation or business

carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Sec. 2 of Art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452."

The Court then cited the income tax laws enacted by Congress since 1861 and called attention to the fact that the income tax law of 1913 (38 Stat. at L. 166, 4 Fed. Stat. Anno. 2nd Ed. p. 326) which imposed tax upon the entire net income from "all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere" evidently furnished the model for Section 1 of the Oklahoma statute taxing nonresidents. The Court then said (on p. 54):

"*No doubt is suggested* (the former requirement of apportionment having been removed by constitutional amendment) *as to the power of Congress thus to impose taxes upon incomes produced within the borders of the United States or arising from sources located therein even though the income accrues to a nonresident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the 14th Amendment imposes*

no greater restriction in this regard upon the several states than the corresponding clause of the 5th Amendment imposes upon the United States." (The italics are ours.)

It is submitted that the only interpretation which can be placed on the last paragraph of the above citation, with respect to the issue in the case of the plaintiff in error, is that the due process clause of the 5th Amendment restricts Congress to the condition that income taxes derived from the business of exporting, in order to be valid, must be imposed equally on all persons under like circumstances and conditions. The conclusion is unavoidable, that when, as in the law under consideration in the case of the plaintiff in error, the discrimination is made to depend on nationality or allegiance, which under the fundamental requirement governing both Federal and State taxation can have no reasonable relation to the business of exporting carried on within the United States by foreign corporations, then the imposition by Congress of the tax upon the income of the plaintiff in error as an American corporation was in violation of the due process clause of the 5th Amendment.

And, in Shaffer *v.* Carter (*supra*) this Court further said (on p. 55):

> "The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition, and that his management was exerted from his place of business in another state, did not deprive Okla-

homa of jurisdiction to tax the income which arose within its own borders. The personal element cannot, by any fiction, oust the jurisdiction of the state within which the income actually arises, and whose authority over it operates *in rem.*"

And (on p. 57):

"It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499. Ann. Cas. 1918E, 748. Compare William E. Peck & Co. *v.* Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432."

And (on p. 59) it is said:

"Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the *lien will rest upon the same property interests which were the source of the income upon which the tax was imposed.*" (The italics are ours.)

The Tax Discrimination Against Plaintiff in Error in Violation of Due Process of Law.

In Raymond *v.* Chicago Union Traction Co. (207 U. S. 20) this Court held that the assessment, by the state board of equalization of Illinois, of the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which resulted in enormous disparity and discrimination, was in violation of the "due process of law" and "equal protection of the laws" provisions of the 14th Amendment of the Constitution of the United States. And in Truax *v.* Raich (239 U. S. 33) this Court again declared that a discrimination against aliens in the United States with respect to "the ordinary means of earning a livelihood", "because of their race or nationality", was in violation of the 14th Amendment. The Court said (on pp. 41 and 42):

> "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, *because of their race or nationality, the ordinary means of earning a livelihood.* It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal

> freedom and opportunity that it was the purpose of this Amendment to secure. * * *If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.* It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare'. The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved." (The italics are ours.)

And (on p. 43):

> "The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law."

It is settled that corporations are persons within the meaning of the "due process of law" and "equal protection of the laws" clauses of the 14th Amendment and of the "due process of law" clause of the 5th Amendment; and hence it is clearly settled by this Court that a discrimination in taxation against American corporations in a lawful business in the United States, and in favor of alien corporations carrying on like business in the United States is in violation of the "due process of law" clause of the 5th Amendment, for it cannot be seriously suggested that a discrimination which violates this

clause when it is directed against the alien does not violate the clause when directed against the citizen. To so contend would be equivalent to asserting that Congress has power to force American citizens to expatriate themselves in order to *"obtain support in the ordinary fields of labor"* or to protect their property in the United States from injury or confiscation. In the decision of this Court in Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. and S. H. Co. (111 U. S. 746) it was said (in the concurring opinion by Mr. Justice Field, on p. 757):

> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. *The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.*" (The italics are ours.)

And in Soon Hing *v.* Crowley (113 U. S. 703) this Court also said (on p. 709) that

> "the discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

In Heisler *v.* Thomas Colliery Co. (260 U. S. 245) this Court dealt with the contention that the imposition by the State of Pennsylvania of a special tax on anthracite coal mined and prepared for market in that State, without the imposition of a like tax on bituminous coal, thereby denied to the plaintiff in that case the equal protection of the laws guaranteed by the 14th Amendment. The Court, by Mr. Justice McKenna, said (on p. 255):

> "In its exercise in taxation, we have said, it is competent for a state to exempt certain kinds of property and tax others, *the restraints upon it only being against clear and hostile discriminations against particular persons and classes.*" (The italics are ours.)

So if the law in that case had exempted from the tax all anthracite coal mined in Pennsylvania by corporations not organized under the laws of Pennsylvania and sold by them beyond the borders of that State, it is clear that it would be held that such tax could not be applied to the coal mined by a Pennsylvania corporation, because in such case the hostile discrimination would have been "against particular persons and classes", and hence in violation of both the due process of law and the equal protection of the laws clauses of the 14th Amendment. This is exactly the situation of the plaintiff in error in the case at bar.

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (247 U. S. 165, cited on pp. 74-77, *infra*), this Court, in dealing with the net income of an American

corporation derived from its exporting business carried on in the United States, which business, as the Court stated, consisted of "buying goods in the several States, shipping them to foreign countries and there selling them", declared that the status of the net income from such business *"is not different from that of the exported articles prior to the exportation"*. It is evident that if such net income did not have such status, it would necessarily be related to the activities of exporting, and hence to tax it would be in violation of Paragraph 5 of Section 9 of Article 1 of the Constitution. That a tax on such net income, irrespective of whether the goods are sold within or without the state, is like a tax on property in the state, is stated by this Court in United States Glue Co. *v.* Oak Creek (247 U. S. 321, cited on pp. 83-85, *infra*), and in Underwood Typewriter Co. *v.* Chamberlain (254 U. S. 113); and is confirmed in Shaffer *v.* Carter (*supra*). Hence, if Congress is not restrained by the "due process of law" clause of the Fifth Amendment from making the discrimination in favor of foreign corporations which is complained of in the case of the plaintiff in error, with respect to the business of exporting carried on in the United States, then Congress would not be restrained from making a discrimination exempting foreign corporations from the payment of customs duties on articles imported into the United States while imposing such duties on American corporations; or from making a discrimination exempting foreign corporations from the sales taxes paid by manufacturers, producers, and importers on domestic

sales, while imposing such taxes on such sales by American corporations; or from making a discrimination exempting foreign corporations in the business of insurance, or banking, or building, or any other business in the United States, from income or profits tax, or capital stock tax, or any other sort of tax which Congress can impose, while levying such tax upon American corporations engaged in like business. To use the words of this Court in Shaffer *v.* Carter (*supra*), such a proposition would be so wholly inconsistent with fundamental principles as to be refuted by its mere statement.

The Opinion of the District Court.

In the opinion of the District Court, it is said (Record, pp. 7, 8):

> *"It is admitted by the Government that the Acts of 1909 and 1913, the wording of which differs slightly from that of the Act of 1918, were in practice applied, at least to some extent, to foreign corporations in respect of income derived from the sale in foreign countries of goods manufactured or acquired in the United States.* It is unnecessary, however, here to consider the proper interpretation to be given to the Acts of 1909 and 1913 or the Act of 1918 as applied to foreign corporations, since I am satisfied of the constitutionality of the law as applied to the plaintiff, even though the income of foreign corporations from like sources is construed to be exempt.
>
> There is, as is now conceded, no question as to the power of Congress to tax the net income

of domestic corporations derived from their export business. The question as to how far it is wise and proper to extend our taxing laws to foreign corporations that manufacture or acquire goods in this country and sell them abroad, involves many economic and political considerations. These are peculiarly within the province of Congress, not the Courts.

* * * * *

* * * So long as the tax on American corporations is measured by net income, actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for any particular contracts, even if it could be assumed that foreign competitors were subject to no equivalent taxation by their own governments. Clearly, however, such a handicap or discrimination does not make the classification such a grave abuse or oppression as to condemn the law as a denial of due process within the Fifth Amendment. For to bring it within this condemnation it must be, as the Supreme Court said in Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1, 24, 25:

> 'A case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.'

In La Belle Iron Works *v.* United States, 256 U. S. 337, 392, 393, the Court again points out:

> " 'The Fifth Amendment has no equal protection clause, and the only rule of uniformity prescribed with respect to duties, imports, and excises laid by Congress is the territorial uniformity required by Art. 1, Sec. 8, * * *. The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required by the States under the equal protection clause, much less of Congress under the more general requirements of due process of law in taxation. * * * The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. * * * If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the tests applied.' "

(The italics are ours.)

This opinion states the admission by the Government that under the Act of Congress of August 5, 1909 (36 Stat. at L., Ch. 6), and the Act of Congress of October 3, 1913 (38 Stat. at L., Ch. 16) the foreign corporation transacting the business of exporting within the United States with capital invested within the United States in such business was taxed upon its income from such business (see pp. 17-19, *supra*).

As to the view of the District Court that Congress may discriminate in its taxing laws by exempting

"foreign corporations that manufacture or acquire goods in this country and sell them abroad" while taxing domestic corporations doing the same thing, for the reason that the taxation of such foreign corporations "involves many economic and political considerations", it is sufficient to say that if such considerations could be invoked to set aside the Constitutional requirement that all persons engaged in the same occupation in the United States under the same circumstances and conditions must be treated alike with respect to taxation, then all rights of life, liberty or property would be at the mercy of Congress. The statement of the District Court is to the effect that Congress, for its own reasons of policy, whatever they may be, can tax the export trade carried on here by our own people at any rate while exempting entirely the like trade carried on here by persons or corporations of foreign allegiance, discriminating against our own people solely on the ground of such foreign nationality or allegiance of those favored by exemption. If Congress can do this with respect to export trade, it can, of course, do likewise with respect to import trade, or with respect to any trade or business carried on in any part of the United States.

As to the statement by the District Court that "so long as the tax on American corporations is measured by net income actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for any particular contracts even if it could

be assumed that foreign competitors were subject to no equivalent taxation by their own governments", it may be said that the complaint in the case of the plaintiff in error relates entirely to the discrimination against its business of exporting in the taxation imposed by the Congress of the United States, and is not concerned with the taxation imposed by the governments of foreign countries. As a matter of fact, the taxation of income or other taxation imposed by foreign governments upon the business activities carried on within their jurisdiction always falls alike upon all who carry on such activities there, whether their own people or aliens; and all such taxes are expenses deducted in computing net income taxed by the United States.

With reference to the citations by the District Court from Brushaber *v.* Union Pacific R. R. Co. (*supra*) and La Belle Iron Works *v.* United States (*supra*), it is submitted that they fully sustain the contention of the plaintiff in error. Applying the language of the Court in the Brushaber case, it is clear that the law in the case at bar *"was so wanting in basis for classification as to produce a gross and patent inequality"* because the discrimination against the plaintiff in error was made to depend *wholly upon difference of nationality or allegiance,* which discrimination this Court has declared would be arbitrary, capricious, or oppressive.

In La Belle Iron Works *v.* United States (*supra*) the Court said (on p. 393):

> "The Act treats all corporations and partnerships alike, so far as they are similarly circum-

stanced. *As to one and all, Congress adjusted this tax, generally speaking, on the basis of excluding from its operation income to the extent of a specified percentage (7 to 9 per cent) of the capital employed, but upon condition that such capital be valued according to what actually was embarked at the outset or added thereafter, disregarding any appreciation in values.* If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to difference in their circumstances, not to any uncertainty or want of generality in the test applied." (The italics are ours, and the words italicized were omitted from the citation by the District Court.)

In the case at bar there was no difference in the circumstances and conditions under which the business of exporting was carried on by the plaintiff in error and foreign corporations, nor was the law general in its operation, since, in the same occupation or business within the United States, it taxed the net income of the plaintiff in error derived therefrom, and entirely exempted from tax the like income of foreign corporations, and hence it is clear that the reasoning of this Court in both of the cases cited by the District Court sustains the contention of the plaintiff in error.

SECOND.

The said alleged taxation imposed upon the said net income or profits of the plaintiff in error's said business of exporting transacted in the United States with capital invested in the United States by the plaintiff in error, constituted a direct burden on and an impediment to the plaintiff in error's said business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State", inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of exporting transacted in the United States with capital invested in the United States by said foreign corporations was wholly exempted under the same law from like taxation.

The Decision in the Peck Case.

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*), this Court dealt with the general tax of one per cent. on net income imposed by the Income Tax Law of 1913. The plaintiff in that case was carrying on the business of exporting in the United States with capital invested in the United States. The Court, in its opinion by Mr. Justice Van Devanter, said (on p. 172):

> "The plaintiff is a domestic corporation chiefly engaged in buying goods in the several States,

shipping them to foreign countries and there selling them. In 1914 its net income from this business was $30,173.66, and from other sources $12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them."

In this opinion this Court held (on p. 173) that under Paragraph 5 of Section 9 of Article I of the Constitution Congress is forbidden to tax articles in course of exportation; the act or occupation of exporting; bills of lading for articles being exported; charter parties for the carriage of cargoes from State to foreign ports; and policies of marine insurance on articles being exported; and then said (on pp. 173-175):

* * * "In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation.' Fairbank *v.* United States, 181 U. S. 292, 293. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation. Thames and M.

M. Ins. Co. *v.* United States, 273 U. S. 19. In this view it has been held that the clause does not condemn or invalidate charges or taxes not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus, a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in Pace *v.* Burgess, 92 U. S. 372, and Turpin *v.* Burgess, 117 U. S. 504, and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in Cornell *v.* Coyne, 192 U. S. 418. In that case it was said, p. 427: 'The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.' "

* * * * *

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid *generally* on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton *v.* Baltic Mining Co., 240 U. S. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its

source, *or in a discriminative way,* but just as it is laid on other income. The words of the Act are 'net income arising or accruing from all sources'. *There is no discrimination.* At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. *Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.* If articles manufactured and intended for export are subject to taxation under *general* laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under *general* laws. *In that respect the status of the income is not different from that of the exported articles prior to the exportation."* (The italics are ours.)

It is to be noted that in this decision the Court pointed out that the tax was "general" in its application and was not laid "on income from exportation because of its source or in a discriminative way." The tax was imposed likewise and equally upon all net income derived from the business of exporting transacted in the United States, whether by American corporations and citizens or by foreign corporations and alien individuals resident or nonresident; and such net income, like net income from other sources, was taxed as an item of

personal property which the recipient is free to use as he chooses, and which by virtue of the Sixteenth Amendment could be taxed as property in the United States without apportionment.

The Discriminating Tax a Burden on the Export Commerce of the Plaintiff in Error.

In the case at bar, however, the tax is not "general" in its operation upon the subject to which it relates, since it is laid "in a discriminative way" for the reason that the tax imposed upon the net income or profits of the plaintiff in error derived from the business of exporting transacted within the United States was not likewise imposed on the net income or profits of foreign corporations derived from the like business of exporting transacted by such foreign corporations within the United States with capital invested in said business by such foreign corporations within the United States. Hence such discrimination against the plaintiff in error imposed a direct and immediate burden on its business or occupation of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, under the principle repeatedly declared by this Court, and which is clearly stated in I. M. Darnell & Son Co. *v.* Memphis (208 U. S. 113).

In that case the opinion of this Court, by Mr. Justice White, sets forth that the Constitution of the State of Tennessee adopted in 1870 provided that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees"; and that

an act of the legislature of 1903, after providing that "all property—real, personal, and mixed—shall be assessed for taxation for state, county, and municipal purposes, except such as is declared exempt in the next section", provided further in the following section that there should be exempt from taxation "manufactured articles from the produce of the state in the hands of the manufacturer". In stating the case the Court said (on p. 116):

> "For more than three years prior to January 30, 1905, the I. M. Darnell Son & Company, a corporation of Tennessee, was domiciled in Memphis, in that state, and there owned and operated a lumber mill. Shortly prior to the date just named, pursuant to chapter 366 of the acts of Tennessee for 1903 (Tenn. Acts 1903, pp. 1097-1101), the value of the personalty of the Darnell Company was assessed for taxation by the city of Memphis at $44.000. Of this amount $19,325 was the value of logs cut from the soil of states other than Tennessee, which the company had brought into Tennessee from other states, and were held by the company as the immediate purchaser or vendee, awaiting manufacture into lumber, or consisted of lumber already manufactured by the company from logs which had been acquired and brought into the state from other states, as above mentioned, and all of which lumber was lying in the mill yard of the company, awaiting sale. The Darnell Company protested against this assessment, asserting that it was not liable to be taxed on said sum of $19,325, the value of the property owned by it as the immediate purchaser of logs brought from

other states, or lumber, the product thereof. The ground of the protest was that the property represented by the valuation in question could not be taxed without discriminating against it, as like property, the product of the soil of Tennessee, was exempt from taxation under the Constitution and laws of that state, and therefore to tax its said property would violate the commerce clause (Sec. 8, Article I) of the Constitution, and the equal protection clause of the 14th Amendment."

In the opinion holding that the tax collected from I. M. Darnell & Son Company imposed a direct burden upon interstate commerce since the law of Tennessee in terms discriminated against property the product of the soil of other States, notwithstanding that the property so taxed, as stated by this Court, "had come to rest and had been commingled with the mass of property within the State", the Court said (on pp. 120 and 125):

"The leading cases announcing the doctrine that a state may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are Woodruff *v.* Parham and Brown *v.* Houston, *supra.* But in both those cases it was sedulously pointed out that the power which was thus recognized did not, and could not, include the authority to burden the property brought from another state with a discriminating tax. In American Steel & Wire Co. *v.* Speed, 192 U. S. 519, 48 L. ed. 546, 24 Sup. Ct. Rep. 365, where the doctrine of Woodruff *v.* Parham and

Brown *v.* Houston was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon interstate commerce, property so situated must be taxed 'without discrimination, like other property situated within the state'."

* * * * *

"As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the state of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause of the 14th Amendment."

In Woodruff *v.* Parham (8 Wall. 123) cited in the Darnell case decision, this Court said (on p. 140):

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States

of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void."

And in Brown *v.* Houston (114 U. S. 622) cited also in the Darnell case decision, this Court said (on pp. 632, 633):

"* * * The coal had come to its place of rest, for final disposal or use and was a commodity in the market of New Orleans. * * * It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. * * * It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

* * * * *

"* * * With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some othe place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods

> of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed."

Since it is settled, by the decision in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) that the net income from the business of exporting in the United States has the same status as articles in the United States intended for exportation before exportation begins, that is to say, personal property at rest in the United States, and by the decision in I. M. Darnell & Son Co. *v.* Memphis (*supra*) that a tax upon such property, discriminating by means of an exemption with respect to the commerce through which the property came, is a direct burden upon such ccommerce, it is clear that the tax in the case of the plaintiff in error was a direct burden upon its export commerce.

It is settled that that which constitutes a burden upon interstate commerce must be a burden upon export commerce when applied thereto. In United States Glue Co. *v.* Oak Creek (247 U. S. 321) this Court dealt with a law enacted by Wisconsin taxing net income, and with the contention that certain items of the company's net income were not taxable because derived from interstate commerce. The Court applied to that case its decision in William E. Peck & Co. *v.* John Z.

Lowe, Jr., Collector (*supra*) relating to net income from export commerce, and said (on p. 329):

> "And so we hold that the Wisconsin Income Tax Law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, *and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business.*" (The italics are ours.)

In that case the Court explained the line of distinction between a tax upon the business of selling goods in foreign commerce measured by a percentage of the gross receipts, which is held unconstitutional no matter how small such percentage may be (Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292), and a tax upon such business measured by a percentage of the net income, such as was sustained in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*). In explanation of this distinction this Court said (on pp. 328 and 329):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and

workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. *Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profit has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, *like a tax upon property*, or upon franchises treated as property; and *if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government*, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states." (The italics are ours.)

Comparing the declaration of this Court in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) that the tax was "*not laid on income from exportation because of its source or in a discriminative way*" with the similar declaration in United States Glue Co. *v.* Oak Creek (*supra*) that a tax on income derived from interstate commerce was within

the power of the states provided *"there be no discrimination against interstate commerce, either in the admeasurement of the tax or the means adopted for enforcing it"*, and comparing both declarations with the conclusion reached by this Court in I. M. Darnell & Son Co. *v.* Memphis (*supra*) to the effect that a tax on property in the State of Tennessee which had come to rest, and therefore was taxable by reason of its ownership, nevertheless imposed a direct burden on the interstate commerce through which it was brought into that state for the reason that like property the product of the soil of Tennessee was wholly exempt from like tax, it must necessarily follow that the tax on the net income of the plaintiff in error imposed a direct burden on its business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution, since foreign corporations carrying on the like business of exporting under the protection of the United States were wholly exempt under the law from like tax. And this burden was far more destructive in its effect than one resulting from a discrimination against all "exportation because of its source."

The Heavy Burden of the Tax.

It is to be noted that the tax in the case of William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) which tax, being *general* and not imposed in a discriminative way, was held to affect exportation only indirectly and remotely and not to be a direct burden on

exports, was at the low rate of one per cent. on net income, whereas the taxes imposed upon the net income of the plaintiff in error have been at much higher rates. While the income tax was at the low rate of one per cent., it was imposed alike upon all those engaged in the business of exporting in the United States; but when the rates of such tax rose to the highest figures ever imposed in the history of the country, the exemption for the foreign corporations was introduced, to add further to the burdens and difficulties of the exporting business of the plaintiff in error, a representative American corporation struggling to maintain its export trade. It was said by this Court in the case of William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*), reaffirming Brown *v.* Maryland (12 Wheat. 419), that the constitutional provision excepts from the range of the power of taxation "the act or occupation of exporting"; yet the plaintiff in error's acts and occupation of exporting have been taxed under the law here considered, by reason of this discrimination, and under the preceding law taxing net earnings which contained the same discrimination favoring the competing foreign corporations, at the rates of 10, 20, 30 or 40 per cent. or more of the net earnings of its exporting business. No argument is needed to show that discriminating taxation at such rates must necessarily have imposed a direct and destructive burden on the business of exporting carried on by the plaintiff in error, giving the foreign competing corporations such advantages as would ultimately force the plaintiff in error to abandon

its export commerce in order to prevent total loss of the capital invested therein.

In the annual report of the Secretary of the Treasury for the fiscal year ended June 30, 1919, in recommending the repeal of the excess-profits tax, he said (pp. 23, 24):

> "Still more objectionable is the operation of the excess-profits tax in peace times. It encourages wasteful expenditure, puts a premium on overcapitalization and a penalty on brains, energy and enterprise, discourages new ventures, and confirms old ventures in their monopolies. In many instances it acts as a consumption tax, is added to the cost of production upon which 'profits are figured in determining prices and has been, and will, so long as it is maintained upon the statute books, continue to be a material factor in the increased cost of living'."

This statement of the Secretary of the Treasury, although made without reference to the discrimination in the Revenue Act of 1918 (*supra*) against American corporations engaged in export trade, will serve to illustrate the extent of the direct burden imposed by the discriminating tax on the business of exporting carried on by the plaintiff in error.

In The Railroad Tax Cases (13 Fed. 722) the Court said (on p. 733):

> "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, *for it is in that form that oppressive burdens are usually laid.*" (The italics are ours.)

Similar Exemption to Nonresident Alien Individuals and Corporations of Porto Rico and The Philippine Islands.

It is to be noted that the law under which the alleged tax was assessed upon the plaintiff in error, known as the Revenue Act of 1921 (42 Stat. at L., Chap. 136) provided in Section 217(*a*) that nonresident alien individuals should have the same exemption that was granted to foreign corporations by Section 233(*b*) and 217(*c*) (see pp. 12, 13, *supra*) with respect to income derived from the business of exporting carried on in the United States. Likewise, in the preceding Revenue Act of 1918 (40 Stat. at L., Chap. 18) it was provided in Section 213(*c*) that nonresident alien individuals should have the same exemption that was granted to foreign corporations by Section 233(*b*) of that Act (see p. 15, *supra*) with respect to such income. It is well known in commercial circles that there are many firms or partnerships engaged in the exporting business in the United States which are composed of alien individuals, of whom nearly all are nonresident aliens. It is characteristic of such firms of aliens in the export trade that only one or two partners will reside in the United States (and hence be taxed on their income derived from the exporting business of the firm) while all the other partners will reside abroad (and hence be exempt from tax on their income derived from such business). It is to be noted also that under the prior laws of 1894, 1909, and 1913 (see pp. 16-19, *supra*) nonresident alien individuals, as well as foreign cor-

porations, were subject to the tax *with respect to income derived from business transacted and capital invested in the United States.* This was in harmony with the principle stated in Shaffer v. Carter (*supra*); and with the principle stated by the English Court in Sulley *v.* Attorney General (see pp. 27, 28, *supra*), wherein it was said:

> "Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, *viz.,* where his profits come home to him. That is 'where he exercises his trade'."

It is to be noted also that the said Revenue Act of 1921 contained the following provisions:

> "Sec. 2. * * * (4) The term 'foreign' when applied to a corporation or partnership means created or organized outside the United States;
>
> (5) The term 'United States' when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia;"
>
> * * * * * *
>
> "Sec. 260. That any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States, shall be subject to taxation under this title only as to income derived from sources within the United States, and in such case the tax shall be computed and paid

in the same manner and subject to the same conditions as in the case of other persons who are taxable only as to income derived from such sources."

Under the authority of these provisions individuals who were citizens of Porto Rico or the Philippine Islands (but not otherwise citizens of the United States) were granted the same exemption from the tax that was given to nonresident alien individuals under Section 217(*a*) of that Act; and corporations organized under the laws of Porto Rico or of the Philippine Islands, and carrying on the business of exporting within the United States, were granted the same exemption from the tax that was given by Sections 233(*b*) and 217(*c*) to corporations organized under the laws of foreign countries. (See Regulations 62 Relating to the Income Tax and War Profits and Excess Profits Tax under the Revenue Act of 1921, Arts. 1131-1133).

The Serious Situation in the Export Commerce of American Merchants.

The plaintiff in error's business of exporting must meet the competition, not only of all other merchants in that business in the United States, but also of merchants in all other parts of the world. In domestic business an occupation has protection by distance and duties on imports from the competition of merchants in foreign countries, but the American merchant in exporting business must meet the competition of such foreign mer-

chants in their own and other foreign countries, in the efforts to find foreign markets for American products.

The serious situation which confronts American merchants engaged in foreign commerce, under the tax discrimination which is complained of in the case of the plaintiff in error, was referred to by the Solicitor General in his motion to advance the hearing of the case at bar, wherein he stated that the report of the Federal Trade Commission (Report on Methods and Operations of Grain Exporters, published on May 16, 1922) showed that in the year 1921 foreign corporations exported more than half of all the wheat shipped from this country.

In an address by the Secretary of Commerce in New York City on November 8, 1923, before the American Marine Congress, which was published in the *New York Times* and the *Sun and Globe* on November 9, 1923, attention was called to the control acquired by foreign merchants over American exports and imports. A copy of this address, prepared for the press by the Secretary of Commerce, is submitted as an appendix to this brief (on pp. 98-105, *infra*). This address shows that, of the total quantity of American goods exported, by far the greater percentage are sold without the United States by foreign merchants who take delivery of such goods in the United States. It is well known that this was also the situation during the war with respect to the purchase of American products for export by foreign governments and merchants; and that during

the war foreign governments controlled most of the available cargo space on vessels sailing for Europe. Control of imports into the United States by foreign merchants necessarily means a large measure of control over exports from the United States, since the exports must be paid for largely from the proceeds of imports.

The Purpose of the Constitutional Provision Forbidding Taxation of Exportation.

In Fairbank *v.* United States (181 U. S. 283), wherein this Court said that no legislation can be tolerated which "destroys the spirit and purpose of the restriction imposed", reference was made to the reason and purpose of the Constitutional provision in Paragraph 5 of Section 9 of Article I, which was to prevent the possibility of any discrimination affecting the exportation of any articles produced in any state or section of the United States, and to make all exportation of all articles free from being a source of revenue to the national government. The Court said (on p. 293):

> "So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports."

The discriminating tax in the case of the plaintiff in error defeats the meaning and purpose of the Constitutional provision. Can it be supposed that the framers of the Constitution, who intended to prevent

any discrimination by taxation for or against the products or the exporting business of any of our citizens in any part of our country, intended to permit a discrimination in taxation in favor of the products and exporting business handled by foreign corporations and aliens in this country, and against the products and exporting business handled by our own citizens and corporations in their own country?

It is clear from the debates of the Constitutional Convention that the framers of the Constitution would have considered this provision violated by a tax law giving preference to the exporting business of corporations organized under the laws of any of the New England States, or of the Southern States, or of any other section; and for the same reason a tax law giving preference to the exporting business of foreign corporations violates this provision of Article I of the Constitution.

In Conclusion.

Briefly the plaintiff in error contends that the amount paid by it under the Revenue Act of 1921 on its net income or profits derived from the business of exporting which it carried on within the United States was not the exertion of taxation but the confiscation of its property in violation of the 5th Amendment of the Constitution of the United States because the like net income or profits of foreign corporations derived from the like business of exporting carried on by such for-

eign corporations within the United States and under the protection of the United States, with capital invested in such business within the United States by such foreign corporations, was wholly exempted from tax under said Revenue Act of 1921. The plaintiff in error also contends that since the foreign corporations with which it necessarily competed in such business of exporting within the United States were entirely exempted from tax on the net income or profits derived from the like business of exporting, such discrimination against the plaintiff in error imposed a direct burden on the property which it exported, and on its business of exporting, in violation of Paragraph 5 of Section 9 of Article 1 of the Constitution of the United States.

The judgment of the District Court should be reversed with costs, and the District Court directed to deny the motion made to dismiss the amended complaint.

Respectfully submitted,

FRANKLIN GRADY,
Attorney for Plaintiff in Error.

P. J. MCCUMBER,
HOMER SULLIVAN,
Of Counsel.

Appendix.

Address by Hon. Herbert Hoover, Secretary of Commerce, Before the American Marine Congress, New York City, Thursday, November 8, 1923.

It is simply a truism to say that we must have an American Merchant Overseas Marine. Entirely apart from the fine sentiment and national pride of a great trading nation in keeping its flag upon the seas, we must have our own ships for the protection of our foreign trade; we must have ships if we would expand our exports on sound lines and we must have them as an auxiliary to our national defense.

It seems worth repeating at times that our international trade is one of the very foundations of our standards of living; that our whole fabric of living and comfort are dependent upon the import of commodities which we do not and cannot ourselves produce—tin, rubber, coffee, sugar, and a score of others; further, in the main the amount of these commodities we can import will depend upon the volume we export. Moreover we need a constant expansion of our export markets to give stability to our internal production by a wider range of customers.

If we are to have secure export markets we must have some sound proportion of American controlled shipping to assure us against combinations in rates which would prejudice our goods in competitive markets.

Nor have our merchants been without the experience of finding that the transport of our goods in foreign bottoms has been taken advantage of by our competitors to learn the details of our trade connections.

The facility of the world in creating combinations in restraint of trade has been growing by leaps and bounds since the war and while we, as a nation, endeavor to curb these activities within our borders, there has naturally been no curbing of these activities abroad when they affect American interests. Today there are many commodities upon which we are dependent by import from foreign lands in which there are combinations in control of price in those foreign lands. Combinations in control of sea rates are the commonest thing in the world shipping fabric. Many of our raw material exports, such as wheat, are sold in the world market in competition with those of other countries and the price level in these cases is the result of competitive streams that flow into these world markets. In wheat the farmer's return is fundamentally the price which he receives at Liverpool less the cost of transportation and handling. Therefore, any increase in shipping rates is in fact a deduction from the price to the farmer. It is just as important to him to be guaranteed reasonable rates of sea transport as of land freight. The real security is an American-owned Merchant Marine. In the long view the expansion of our foreign trade must and will take place in the export of larger proportions of manufactured goods. The primary requisite for such expansion is the assurance

of regularity in transportation. Not only do we need regularity of sailings week by week, in order that the manufacturer may be assured in his problems of delivery, but our merchants and manufacturers require to know that when they have established their goods in foreign lands then regular transportation will be assured to them over years to come. They cannot be dependent upon hazards of foreign ship owners, allied as these owners are with foreign merchants and competitors.

We must have especially regular and positive transportation under our flag on those great trade routes where our commerce can and will expand. Nor can America be dependent for her movement of overseas goods upon the make and break of peace and war in different parts of the world. We have had one gigantic national experience with this already. We must have ships under our own flag if we are to have security in our vital supplies and exports when other nations go to war with each other. As an auxiliary of our national defense we must have preparedness in transport for soldiers and supplies; we must have a training ground for our sailors, or our Navy itself would be helplessly confined to our own coasts.

In a broad sense the American people are endeavoring to establish a Merchant Marine that will adequately protect and promote our commerce. The ideal is regular, ferry like service of boats of the cargo liner type with some passenger capacity traversing the great trade routes of the world and carrying at least 50% of our foreign trade. Today, outside of oil, we are carrying

less than 20%. Some day we will attain such a merchant marine. Our national necessities, the capacity of our people for organization, for mechanical development and enterprise will some day bring it about. In the meantime we have much divided opinion in public mind, in the shipping world and in Congress, as to method. And our shipping world is suffering from great handicaps.

It is not my purpose to review all these handicaps that are so familiar to you but rather to present to you one single phase that has not been so generally considered that is capable of remedy. That is the relationship that American merchants abroad must bear to the success of an American Merchant Marine. *We will never have a real American Merchant Marine until we have a much larger complement of merchants of our own nationality conducting our commerce in foreign ports. Our raw materials are largely sold at our shores to foreign merchants.* They dictate the shipping. Again most of our purchases of raw materials are for delivery at our shores. The foreign merchant again controls the shipping. If we except oil, most of our manufactured goods for export are dealt with by foreign merchants. How real all this is, is shown by the fact that except oil only about 12% of our imports and exports were managed by American merchants abroad.

The situation is just as insecure for our exports as for our shipping. If we would make sure of the continuous flow of goods we must have the American

on the ground distributing to the foreign retailer, securing business by his services as well as his price. Many an American merchant has seen his established trade disappear because he depended upon a foreign merchant not to show patriotism to his own country. This situation has been contributed to by the tendency of some of our manufacturers to regard export as a happy hunting ground in times of domestic depression, to be abandoned in times of domestic demand. *We cannot have a Merchant Marine without an army of American merchants in foreign ports. This is the foundation of our British competitors.*

No stable consumption of goods can be built up on such a fabric. And other things being equal, the merchant ships his goods under his own flag, even giving a preference to that flag. Our competitors certainly do so. The lack of growth in our merchant personnel abroad is, I believe, to a large degree the fault of our Government for reasons I will detail later.

Despite our expanding export and import trade, the number of our merchants abroad has decreased in late years and yet if we would have a merchant marine they must be increased. The taxation policies of our Government have been to some degree responsible for this situation.

We are asking our merchants to expatriate themselves in order to sell American goods and manage American ships. Up to 1919 our own Government imposed upon them in income taxes the same percentage of their profits as upon our merchants resident at

home. They also paid taxes to the Government where they resided. We thus demanded that they pay double taxes. Some relief is afforded by the provision that the amount of taxes paid in the foreign countries may be deducted from the income tax which is payable to the United States, but this does not cover the entire problem. For instance, American merchants in the Latin-American countries, the Orient and some European states pay our very high income tax, while the amount deductible for taxes paid in those countries is very small. British merchants resident there pay no taxes to their home government, and thus the cost of our doing business through merchants of our own nationality willing to reside abroad in the cause of promotion of American commerce is greater than that of our competitors or of our doing business through foreigners.

It is, therefore, felt by many as more economic for Americans to stay at home and sell their goods in the Argentine through a German or a British merchant. Scores of our merchant firms, totally discouraged, have thrown up the sponge.

Before the war, there were at least 1,000 American engineers employed abroad at substantial salaries. These men went abroad to install American methods, American machinery and equipment in the production of raw materials, and in transportation. These salaried workers found themselves at the end of the war subject to two gigantic income taxes and thus their foreign mission was unprofitable. I doubt whether there are

100 of them left in foreign territories today. The relief given is only partial, as I have said above. A vast stream of American machinery and equipment that followed in their wake has dried up.

There is one phase of this matter of vital importance to our farmers. Over 80 per cent. of our agricultural exports go to Europe. Before the war European merchants bought stocks of wheat and grain during our fall marketing season and thus assisted in financing the crop. They carried stocks in European warehouses, thus relieving our congestion. Today, shortage of finance and credit leads them to buy from day to day and thrusts the burden of carrying the world's seasonal reserves either upon our own farmers or upon our merchants. If our merchant firms were established in Europe it would be possible for them to give delivery at that end and to establish short credits to their customers—all of which would relieve our farmers. But American merchants are not likely to establish in the lower tax countries in Europe and to pay high income taxes compared with our competitors.

Another case of pertinent order is that on the China Coast. Inasmuch as China has no dependable corporation law much Chinese capital is invested in foreign corporations under the management of, or in partnership with, Europeans. As foreign governments exact no home taxation from such corporations or their stockholders the Chinese naturally prefer them. We attempted to remedy this by Congressional authority to establish special American corporations under Federal

authority, but the restrictions are such that the Act has failed its purpose. Three large American managed businesses have gone over to control of our competitors at a real loss to our foreign trade and the great discouragement of our merchants. Similar questions are arising in the Philippines.

I wish to repeat that if we are to secure the establishment of a merchant marine we must secure dispersion of the American merchant and our Government today is one of the most destructive influences in the whole matter. I do not wish to argue the theory that Americans who are engaged abroad in reproductive work should not bear their share of the national burden. I would only point out that other nations have found it is uneconomic to impose this burden upon them, and that we are left in a prejudiced position. Nor am I pleading the cause of the American expatriot, who prefers foreign civilization as a luxury, who is bringing no returns to his country by way of his savings or by way of his expansion of American trade.

These two groups are quite distinct. They can be distinguished in tax measures so as to apply the relief only to incomes earned abroad. One is tied passionately to his country's interests and the expansion of its welfare; America to him is the home he serves in managing her trade. He will yet return with his savings to add to the national wealth, whereas the other is but a pensioner on our national resources. And yet as a nation we penalize the one who brings us service and credit. (The italics are ours.)

INDEX.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 547.

BARCLAY & CO., INCORPORATED,
Plaintiff-in-Error,

vs.

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of New York,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The questions involved come to this Court upon a writ of error to the District Court of the United States for the Southern District of New York. The plaintiff

in error is a Delaware corporation which has its principal place of business in the city of New York, in the State of New York, in the United States, and during all the times stated in the complaint was and still is engaged within the United States in the business of manufacturing goods for disposition in foreign countries and exporting and disposing of said goods in foreign countries, that is to say, the manufacture of goods within the United States by said plaintiff in error, the exportation of said goods by said plaintiff in error, and the disposition of said goods in foreign countries by said plaintiff in error.

In such business of manufacturing and exporting, the said plaintiff in error was, and is, necessarily subject to the competition of corporations organized, authorized or existing under the laws of foreign countries, and under the laws of Porto Rico and the Philippine Islands, which by the terms of the Revenue Act of 1918 hereinafter mentioned were denominated foreign countries (not included in the term 'United States') and whose corporations were classified as foreign corporations; which said foreign corporations at all times stated in the complaint, and before and since, were and are, similarly engaged within the United States in the like business of manufacturing goods for disposition in foreign countries and disposing of said goods in foreign countries, that is to say, the manufacture of goods within the United States by said foreign corporations, the exportation of said goods by said foreign corporations, and the disposition of said

goods in foreign countries by said foreign corporations. And, as stated in the compiaint, such foreign corporations have invested under the protection of the United States large amounts of capital within the United States in such business of manufacturing and exporting, which business of manufacturing and exporting was and is transacted by said foreign corporations under the same or like circumstances and conditions, and in the same or like manner, as the said plaintiff in error transacted the said like business of manufacturing and exporting.

The cause of action stated in the complaint relates to the assessment and collection from the plaintiff in error of the income tax and excess profits tax imposed with respect to the plaintiff in error's fiscal year ended December 31, 1918, under the provisions of the Act of Congress approved February 24, 1919, known as the Revenue Act of 1918 (40 Stat. at L., Chap. 18). In all of the said fiscal year, the plaintiff in error's business consisted of manufacturing for export and exporting, as stated above, and its net income or profits for said fiscal year accrued or were derived from its said business of manufacturing for export and exporting, so carried on.

The plaintiff in error was notified by the defendant in error that, upon the basis of the return which had been filed by the plaintiff in error for its said fiscal year, as required by law, it was assessed and compelled to pay to the defendant in error the sum of $30,297.81, as and for the taxes imposed by the said Act of Congress upon all of the net income or profits of its said fiscal year, and

that payment must be made of said sum in quarterly payments beginning on or before March 15, 1919, unless paid in full on or before that date, said notice being the usual notice under the Income Tax Law. The plaintiff in error thereupon paid to the defendant in error the said amount of said assessment in four quarterly payments, of which $8,000.00 paid on March 14, 1919 is the payment to which said cause of action relates; and said plaintiff in error accompanied said payment with a written protest that the said amount of taxes was illegally assessed and collected, in violation of the provisions of the Constitution of the United States. Thereafter, on or about February 23, 1923, the plaintiff in error made to the Commissioner of Internal Revenue a claim for refund of the taxes so paid under protest, as aforesaid, on the ground that said taxes were illegally assessed and collected, inasmuch as the taxes were assessed and collected in violation of the provisions of the Constitution of the United States.

On February 26, 1924, more than six months after the filing of said claim for refund, as provided by Section 1318 of the Act of Congress approved November 23, 1921, known as the Revenue Act of 1921 (42 Stat. at L., Chap. 136, Section 1318), the plaintiff in error sued the defendant in error in the District Court for the recovery of the amount of $7,600.00 of said payment of taxes on March 14, 1919, on the ground that the assessment and collection of said amount were in violation of the 5th Amendment of the Constitution of the United States and in violation of Paragraph 5 of Sec-

tion 9 of Article I of the Constitution of the United States (Complaint appears in the Record, pp. 2 to 5). The defendant in error moved to dismiss the complaint as not stating facts sufficient to constitute a cause of action, and demanded judgment dismissing the complaint (Record, p. 5).

The motion to dismiss the complaint was granted by the District Court on the authority of National Paper & Type Company *v.* Edwards, 292 Fed. 633. The opinion of the District Court in that case appears in the Record at pages 6 to 8.

Assignment of Errors.

The errors assigned are:

FIRST: That the Court erred in holding that the complaint did not state facts sufficient to constitute a cause of action; and in granting the Defendant's motion for judgment on the pleadings.

SECOND: That the Court erred in holding that the Congress of the United States may arbitrarily tax the net income or profits of the Plaintiff accrued or derived from the business of manufacturing goods within the United States by the Plaintiff and exporting and disposing of such goods in foreign countries by the Plaintiff when the like net income or profits of foreign corporations accrued or derived from the said like business of manufacturing goods within the United States by said foreign corporations and exporting and disposing of such goods in foreign countries by said foreign corpora-

tions, transacted within the United States by said foreign corporations under the protection of the United States with capital invested in said business within the United States by said foreign corporations, is wholly exempted from like taxation by the Congress of the United States.

THIRD: That the Court erred in holding that the alleged tax imposed by the Congress of the United States on the net income or profits of the Plaintiff accrued or derived from the business of manufacturing goods within the United States by the Plaintiff and exporting and disposing of such goods in foreign countries by the Plaintiff was not the confiscation or taking of Plaintiff's property in violation of the Constitution of the United States when the like net income or profits of foreign corporations accrued or derived from the said like business of manufacturing goods within the United States by said foreign corporations and exporting and disposing of such goods in foreign countries by said foreign corporations transacted within the United States by said foreign corporations under the protection of the United States, with capital invested in said business within the United States by said foreign corporations, and under the same or like circumstances and conditions and in the same or like manner as the Plaintiff transacted the said like business within the United States of manufacturing goods and exporting and disposing of such goods in foreign countries, was wholly exempted from like taxation by the Congress of the United States.

FOURTH: That the Court erred in holding that the tax imposed by the Congress of the United States upon the net income or profits of the Plaintiff, accrued or derived from the business of manufacturing goods within the United States by the Plaintiff and exporting and disposing of such goods in foreign countries by the Plaintiff, did not impede and discourage the Plaintiff's said business of manufacturing and exporting and thereby impose upon Plaintiff's said business of manufacturing and exporting a direct and immediate burden in violation of the Constitution of the United States, when the like net income or profits of foreign corporations accrued or derived from the said like business of manufacturing goods within the United States for disposition in foreign countries by such foreign corporations, with capital invested in such business within the United States by such foreign corporations, and the exportation and disposition of such goods in foreign countries by such foreign corporations, was wholly exempted from like taxation by the Congress of the United States.

FIFTH: That the Court erred in holding that the law taxing the net income or profits of the Plaintiff accrued or derived from the business of manufacturing goods within the United States and exporting and disposing of such goods in foreign countries by the Plaintiff was general in its operation on the subject to which it related.

SIXTH: That the Court erred in holding that the law taxing the Plaintiff was not so wanting in basis for

classification as to produce a clear and hostile discrimination against the Plaintiff in violation of the Constitution of the United States.

SEVENTH: That the Court erred in holding that the Congress of the United States may arbitrarily and oppressively tax the net income or profits of the plaintiff accrued or derived from the business of manufacturing goods within United States and exporting and disposing of such goods in foreign countries when the like net income or profits of foreign corporations accrued or derived from the like business of manufacturing goods within the United States by said foreign corporations and exporting and disposing of such goods in foreign countries by said foreign corporations was wholly exempted from like taxation for political and economic reasons or considerations having no possible connection with the duties of said foreign corporations as taxpayers transacting said business within the United States under the protection of the United States with capital invested in said business within the United States by said foreign corporations.

EIGHTH: That the Court erred in dismissing the complaint herein, and in entering a judgment to that effect.

The foregoing assignments of error amount substantially to the single contention that the lower court should have denied the motion to dismiss the complaint, and should have made an order to that effect.

Contention of Plaintiff in Error.

The alleged tax, imposed upon the net income of the plaintiff in error accruing from its business of manufacturing goods within the United States for disposition in foreign countries and exporting and disposing of such goods in foreign countries, for the recovery of which alleged tax this action was brought, was, with respect to the entire exemption therefrom of the like net income accruing likewise to foreign corporations transacting the like business of manufacturing goods within the United States for disposition in foreign countries and exporting and disposing of such goods in foreign countries, with capital invested in the United States in said like business, by said foreign corporations, a hostile discrimination and confiscation of property forbidden by the "due process of law" provision of the Fifth Amendment of the Constitution of the United States; and was also a burden on and impediment to the exporting business of the plaintiff in error in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States.

Outline of Argument.

First.

The assessment and collection of the alleged tax on the plaintiff in error's net income or profits accrued or derived from its said business of manufacturing goods within the United States for disposition in foreign countries and exporting and disposing of such goods in foreign countries, with capital invested within the United States, was not the exertion of taxation but the confiscation or taking of plaintiff in error's property, in violation of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be "deprived of life, liberty or property without due process of law", inasmuch as under the provisions of the law imposing such alleged tax upon the plaintiff in error corporations organized under the laws of foreign countries were wholly or entirely exempted from the payment of like tax on like income or profits accruing or derived from the like business of manufacturing goods within the United States for disposition in foreign countries and exporting and disposing of such goods in foreign countries, transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which said like business of manufacturing for export and exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the

same or like manner as said plaintiff in error transacted the said like business within the United States, that is to say, the manufacture of goods within the United States, the exportation of such goods, and the disposition of such goods in foreign countries.

Second.

The said alleged taxation imposed upon the said net income or profits of the plaintiff in error's said business of manufacturing goods in the United States for export and exporting and disposing of such goods in foreign countries, transacted in the United States with capital invested in the United States by the plaintiff in error, constituted a direct burden on and impediment to the plaintiff in error's said business of exporting in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State", inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of manufacturing goods in the United States for export and exporting and disposing of said goods in foreign countries, transacted in the United States with capital invested in the United States by said foreign corporations, was wholly exempted under the same law from like taxation.

ARGUMENT.

FIRST.

The assessment and collection of the alleged tax on the plaintiff in error's net income or profits accrued or derived from its said business of manufacturing goods within the United States for disposition in foreign countries and exporting and disposing of such goods in foreign countries, with capital invested within the United States, was not the exertion of taxation but the confiscation or taking of plaintiff in error's property, in violation of the Fifth Amendment of the Constitution of the United States, which provides that no person shall be "deprived of life, liberty or property without due process of law", inasmuch as under the provisions of the law imposing such alleged tax upon the plaintiff in error corporations organized under the laws of foreign countries were wholly or entirely exempted from the payment of like tax on like income or profits accruing or derived from the like business of manufacturing goods within the United States for disposition in foreign countries and exporting and disposing of such goods in foreign countries, transacted under the protection of the United States by said foreign corporations within the United States with capital invested by said foreign corporations within the United States, which said like business of manufacturing for export and exporting was transacted by said foreign corporations under the same or like circumstances and conditions and in the same or like manner as said

plaintiff in error transacted the said like business within the United States, that is to say, the manufacture of goods within the United States, the exporation of such goods, and the disposition of such goods in foreign countries.

The Law in the Case.

The law under which the defendant in error claimed to act in assessing and collecting the said alleged tax from the plaintiff in error (Sections 230 and 301 of the Act of Congress approved February 24, 1919, known as the Revenue Act of 1918, 40 Stat. at L., Chap. 18) is in its pertinent parts as follows:

> "Section 230 (*a*). That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:
>
> (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and
>
> (2) For each calendar year thereafter, 10 per centum of such excess amount."
>
> * * * * * *
>
> "Section 301 (*a*). That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket.

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital;

Third Bracket.

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(*b*) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (*c*) of this section) a tax equal to the sum of the following:

First Bracket.

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital.

Second Bracket.

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital."

The provisions of this law which granted to foreign corporations engaged in the United States in the like

business of manufacturing for export and exporting entire exemption from the said taxes imposed upon the plaintiff in error, which exemption is set forth in the complaint (Record, p. 3), are as follows:

> "Sec. 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (*b*) of section 212 or in section 226."
>
> "Section 233 (*a*). That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in section 213, except that:
>
> * * * * * *
>
> (*b*) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States."

Taxation in Part of Such Foreign Corporations under the Revenue Act of 1921.

It is to be noted that in the Revenue Act of 1921 (42 Stat. at L., Chap. 136), which succeeded the Revenue Act of 1918 with which the case of the plaintiff in error has to do, Congress gave some recognition to the

discrimination made by the said Act of 1918 against American corporations and citizens engaged in the business of manufacturing for export and exporting, and provided in the Act of 1921 for the imposition of the tax on a part of the income of foreign corporations and nonresident alien individuals derived from the like business in the United States of manufacturing for export and exporting. The provisions of the Act of 1921 which imposed upon the foreign corporations and citizens a part of the tax imposed upon the American corporations and citizens in like business are as follows:

> "Sec. 233 (*b*). In the case of a foreign corporation, gross income means only gross income from sources within the United States determined (except in the case of insurance companies subject to the tax imposed by section 243 or 246) in the manner provided in section 217.
>
> "Sec. 217 (*a*). That in the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States:
>
> * * * * * *
>
> "(*e*). Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (*a*) and (*c*), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary * * * Gains, profits and income from * * * or (2) from the sale of personal property produced (in whole or in part) by the

> taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold."

So that, when foreign corporations and nonresident alien individuals manufactured or produced personal property within the United States and exported and sold such personal property without the United States, this law of 1921 provided (and the Act of Congress approved June 2, 1924, known as the Revenue Act of 1924, by reenacting the same provisions of the Act of 1921 provides) for an allocation by the Commissioner of Internal Revenue whereby a part of the income derived from such business in the United States is made subject to the tax at the rate prescribed by the law; while all of the income derived by American corporations and citizens from like business in the United States is made subject to the same rate. It is submitted that this allocation under the laws of 1921 and 1924 is a recognition by Congress of the peculiarly hostile discrimination against the said business of the plaintiff in error under the Revenue Act of 1918, with which the case at bar is concerned.

Like and Equal Treatment under Prior Income Tax Laws.

All the income-tax laws of the United States enacted during the years prior to the European War, and following the law of 1866, provided that the tax, at the same rate as for domestic corporations, should be imposed upon foreign corporations with respect to income accruing from "business transacted and capital invested within the United States"; and under such provisions such foreign corporations were obliged to make return of, and pay the tax upon, their income derived from the manufacture or purchase of personal property in the United States and the exportation and disposition of such property in foreign countries.

The provisions of our laws of 1894, 1909 and 1913, under which like and equal taxation was imposed upon the foreign corporations, were as follows:

In the Act of August 27, 1894 (28 Stat. at L., Chap. 349, pp. 553, 555):

> "Sec. 31. Any nonresident may receive the benefit of the exemptions heretofore provided for by filing with the deputy collector of any district a true list of all his property and sources of income in the United States and complying with the provisions of section twenty-nine of this act as if a resident. In computing income he shall include all income from every source, but unless he be a citizen of the United States he shall pay only on that part of the income which is derived from any source in the United States. In case such nonresident fails to file such statement, the collector of each district

shall collect the tax on the income derived from property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such nonresident shall be liable to distraint for tax; Provided, that nonresident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against nonresident persons.

Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, savings institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies or associations doing business for profit in the United States no matter how created and organized, but not including partnerships."

In the Act of August 5, 1909 (36 Stat. at L., Chap. 6, pp. 112, 113):

"Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organ-

ized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends, upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed."

In the Act of October 3, 1913 (38 Stat. at L., Chap. 16, p. 172):

"G. (*a*) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the pre-

ceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year."

Foreign Corporations Carrying on in the United States the Business of Manufacturing for Export and Exporting.

It is well known and officially admitted that foreign corporations are, and were, engaged within the United States in the business of manufacturing for export and exporting, and that such foreign corporations have invested under the protection of the United States large amounts of capital in such business; and that under the said Revenue Act of 1918 such foreign corporations were wholly exempted from the payment of tax on the net income or profits derived therefrom. The plaintiff in error during the time said Revenue Act of 1918 remained in effect necessarily competed with such foreign corporations in transacting the like business of exporting and manufacturing for export within the United States and, as stated in the complaint, such business was transacted by such foreign corporations under the same or like circumstances and conditions, and in the same or like manner, as the plaintiff in error transacted the said like business within the United States. That is to say, the plaintiff in error and such foreign cor-

porations leased or erected factories in the United States, installed machinery therein, purchased raw materials which were used therein, employed labor in the operation of the factories so equipped, paid for such factories, machinery, materials and labor with capital invested within the United States, and manufactured goods in such factories; negotiated contracts for the transportation of such goods from the United States to foreign countries; disposed of such goods to buyers in foreign countries through agents employed for that purpose; and received within the United States the net income or profit derived from said business. The discrimination against the plaintiff in error was therefore made to depend entirely upon difference in nationality or allegiance of the foreign corporations with which it competed in such business within the United States.

In a country of great natural resources like the United States, with a stable and enlightened Government guaranteeing security for life, liberty and property, it was natural and inevitable that a very large foreign trade would follow the development of such resources, and that foreign commercial interests, attracted by this great opportunity, would invest their capital in the United States and compete with American citizens and corporations in supplying the demand of foreign countries for American products, by manufacturing or acquiring such products in the United States and exporting and disposing of the same in foreign countries. Under our Constitution and laws, and in accordance with rights guaranteed by treaties negoti-

ated by the United States with practically all the commercial nations of the world, the citizens and corporations of these foreign countries have been freely admitted into the United States and allowed to engage in manufacturing or any other lawful business or occupation on the same terms and conditions as American citizens and corporations, and hence such foreign corporations and citizens enjoy, under the protection of the United States, all the commercial rights and privileges conferred by our national and state constitutions and laws equally with our own corporations and citizens.

If the Revenue Act of 1918 had imposed tax on the income of these foreign corporations transacting within the United States the business of manufacturing for export and exporting, deductions from gross income under that Act would have included the commissions or salaries paid to their agents in foreign countries for effecting the disposition of the exported goods in the foreign countries, as well as the taxes paid by such agents for account of such foreign corporations, and hence all of the net income received by them within the United States was earned by such foreign corporations under the protection of the United States from business transacted and capital invested within the United States.

With reference to the activities of both foreign and domestic corporations in connection with the business of manufacturing goods in the United States for export and exporting and disposing of such goods in foreign countries, it is well known that such activities include the maintenance in the United States of factories, ware-

houses, offices, etc.; the purchase or leasing of agricultural, timber, oil, and mineral lands, and the preparation or manufacture of articles of commerce from the products thereof; and the purchase or leasing of wharves or docks for use by the vessels which such corporations own or charter in the United States for the transportation of such goods to foreign countries.

The Attorney General's Opinion on the Exemption of Foreign Corporations under the Law in the Case.

On November 3, 1920, the Attorney General of the United States sent to the Secretary of the Treasury an opinion which construed said Section 233 (*b*) of the Revenue Act of 1918 (see page 15, *supra*). This opinion (32 Op. Atty. Genl. 336) was promulgated by the Secretary of the Treasury for the information and guidance of the collectors of internal revenue and others concerned, and its pertinent parts, which governed the application of the tax in the case of the plaintiff in error, are as follows:

"DEPARTMENT OF JUSTICE,
WASHINGTON, November 3, 1920.

SIR:

I have the honor to acknowledge receipt of your letter of August 12; 1920, requesting an opinion as to whether, under the Revenue Act of February 24, 1919, in the five following cases, the foreign corporation or partnership derives income from sources within the United States, and, if so, what is the measure for determining the amount of income derived from such sources.

(1) R. Burleigh and Sons, a corporation organized under the laws of Scotland, owns and operates two saw mills in the United States, one at Dermott, Arkansas, and the other at Dawson Springs, Kentucky. The mills saw logs into plank squares called 'handle blanks' and also roughly turn hammer handles. These products are all exported to Glasgow where they are finished at the home mill. In addition the manager of the American plant buys logs in the United States and exports them as such to Great Britain. No part of the products of the mills located in this country or of the logs purchased here is sold in the United States but the entire output is sold in Great Britain. The plants and operations of the manager in the United States are conducted solely from funds sent to this country from the home office in Glasgow, Scotland, and no funds are sent to the home office from the American plants.

Section 213(*a*) of the Act of February 24, 1919, defines gross income as follows:

> Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> (*a*) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the

compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (*b*) of section 212, any such amounts are to be properly accounted for as of a different period * * *

Section 233 (*b*) provides:

In the case of a foreign corporation, gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States.

No income is derived from the mere manufacture of goods; before there can be income there must be sale; and there is no income from sources within the United States from goods manufactured here unless there is, in the language of Section

233(*b*), both 'manufacture and disposition of goods within the United States.' The obvious purpose of this section is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad, and without being disposed of by the owner in this country. I conclude, therefore, that when Burleigh & Sons manufacture or partially manufacture articles in this country but do not sell or dispose of them until they are taken to Scotland, there is no gross income from sources within the United States within the meaning of the Act.

As to the purchase and exportation of logs, since profits that may accrue from such transactions are not specifically provided for in Section 233(*b*) if such gains or profits are gross income from sources within the United States, they must be so because they represent compensation from trades, businesses, commerce, etc., as enumerated in Section 213(*a*), which are carried on within the United States.

In Sulley *v.* Attorney General, 5 H. & N. 711 (2 B. T. C. 149), under a statute taxing the income of non-residents 'from any property whatever in the United Kingdom, or profession, trade, employment, or vocation exercised within the United Kingdom,' the facts are similar to those above stated. Sulley was a partner in a firm of general merchants and drapers carrying on business in both the United States and England. Sulley resided in England and the other partners in the United States. Sulley transacted the business of the firm in England, which consisted of purchasing

goods in England and shipping them to the United States. No money was received in England except what was sent from the United States, and the profits of the business were made by the resale of goods at an increased price in the United States. The Court held that the liability to income tax attached only to such profits as came home to England as the share of Sulley, the partner resident there. The Lord Chief Justice said:

> The question is, whether there is a carrying on or exercise of the trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the subject matter of the statute. Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where the profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchaser of the goods to income tax. In the present case the defendant is a partner; but if the argument is well founded this American firm might be taxed in the same way if he had been merely an agent. It would be most impolitic thus to tax those who come here as customers. The subject of a foreign State, not resident here,

cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed. But in the present case no profits are received by the firm, or exist in this country * * * The profits of the firm in America do not accrue in respect of any trade carried on in this country, but in respect of the trade carried on in New York, where the main business is conducted.

In State *ex rel.* Manitowoc Gas Co. *v.* Wisconsin Tax Commission, 161 Wis. 111, the Supreme Court of Wisconsin said:

> If an income be taxed, the recipient thereof must have a domicile within the State, or the property or business out of which the income issues must be situate within the state so that the income may be said to have a situs therein.

By a parity of reasoning I conclude that income which may accrue to Burleigh and Sons in England by sale of logs purchased in the United States is not income from sources within the United States.

* * * * * *

Respectfully,

WM. L. FRIERSON,
Acting Attorney General.

To the Secretary of the Treasury."

It is important to note with reference to this opinion of the Attorney General that the decision of the English

Court in Sulley *v.* Attorney General (*supra*), cited therein, holds that (see pages 28, 29, *supra*):

> "Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place of business in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. * * * The subject of a foreign State, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed."

It is thus evident that if American corporations had been engaged in the business of manufacturing for export and exporting in Great Britain, with capital invested in such business under the protection of the laws of that country, and in the transaction of such business had manufactured and exported goods; had disposed of such goods through agents in foreign countries; and received the proceeds of such disposition within Great Britain in like manner as foreign cororations receive the proceeds within the United States from the business of manufacturing for export and exporting transacted by them within the United States, such American corporations would undoubtedly have been required to pay tax to Great Britain on the net income or profits derived from such business in Great Britain.

It will also be noted that the Attorney General in his opinion (*supra*) cites from the decision of the Supreme Court of Wisconsin in State *ex rel.* Manitowoc Gas Co. *v.* Wisconsin Tax Commission, 161 Wis. 111, apparently in order to show that judicial authority supports Congress in determining that the source of income from capital invested in the manufacture of goods within the United States for disposition in foreign countries is the foreign country in which such goods are sold. But this citation (*supra*) states that the situs of such income is the property or business within the State *"out of which the income issues"*, which is exactly in accordance with the decisions of this Court in Shaffer *v.* Carter (*infra*), Underwood Typewriter Co. *v.* Chamberlain (*infra*), and United States Glue Co. *v.* Oak Creek (*infra*), so that such citation lends no support to the view advanced by the Attorney General.

Under the Revenue Act of 1918 and all income tax laws enacted prior thereto, citizens of foreign countries residing within the United States and engaged in the business of manufacturing for export and exporting were required to pay tax on net income or profits derived therefrom, which business was transacted by them in the same or like manner as foreign corporations transacted the like business within the United States. The justification for the imposition of such tax must be found in the fact that such business was transacted by such resident alien individuals within the United States, and under the protection of the United States, and certainly no distinction can be drawn between such business

transacted by resident alien individuals and like business transacted by foreign corporations residing within the United States. That a corporation may reside in a country other than that in which it was organized, and from which it received its charter or franchise, is shown by the following citations from decisions by United States and English courts:

In St. Clair *v.* Cox (106 U. S. 350), this Court said (on p. 355):

> "* * * Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.
>
> All there is in the legal residence of a corporation in the State of its creation, consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should

not be equally deemed to represent it, in the States for which they are respectively appointed, when it is called to legal responsibility for their transactions.

In Zambrino *v.* Galveston, H. & S. A. Ry. Co. (38 Fed. 449), the Court said (on p. 453):

"The English doctrine as to the competency of an American corporation to acquire a residence in England is stated by Justice Blackburn in Newby *v.* Fire Arms Co. In that case the defendant corporation had a place of business in England and there *de facto* carried on its business, just as an English corporation might have done, but the principal place of business and head office were in America. The Court said:

'Such a corporation does, for many purposes, reside both in England and in its own country. * * * And in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there. L. R. 7 Q. B. 293, I Moak, Eng. R. 326, 327.'"

In the opinion of the Lord Chancellor in De Beers Consolidated Mines Ltd. *v.* Howe (1906), 5 B. T. C. 198, it was said by the English court:

"A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company."

And in Goerz *v.* Bell (1904), 2 K. B. 136, 150, the English court said:

> "Although the company, by getting itself registered in the South African Republic, undoubtedly desired, so far as that term is applicable to a company before incorporation, to take advantage of the laws of that country, yet, having regard to the constitution of the company as appearing from its articles, I can see nothing to prevent it after incorporation from residing elsewhere, either instead of, or as well as, in the South African Republic, and I think that the company did reside elsewhere. Of course it, or its promoters, intended to get the benefit of the law of the Transvaal, and did get it and no doubt the intention was that it should be a 'Boer' and not an 'Uitlander' company, and it got very substantial advantages in its operations by reason of its being incorporated there instead of in England; it was so incorporated on purpose. These facts show, in my opinion, that it was from the very first intended that the operations of the company might be mainly outside the Transvaal, and in fact they were mainly outside that country. Upon the dicta to be found in past decisions, I think this company must be taken to be resident in the United Kingdom."

In Corpus Juris, Vol. 14A, Sec. 3945, it is said (on p. 1240):

> "A corporation which seeks to establish a business domicile in a State other than that of its creation must take that domicile as individuals are always expected to do, subject to the responsibilities

and burdens imposed by the laws which it finds in force there. It becomes amenable to the laws of the latter State and to the process of its courts, upon the same principle, and to the same extent as natural persons or domestic corporations."

It is to be noted also that Congress recognizes that foreign corporations transacting business within the United States are *resident* in the United States, by referring in paragraph 1 of Section 217 (*a*) of the Revenue Act of 1921 (42 Stat. at L., Chap. 136) to such foreign corporations as "resident foreign corporations".

Treaty Rights Under Which Foreign Corporations Carry on Business in the United States.

An illustration of the rights granted by treaties of the United States to aliens (including alien corporations) to carry on business in the United States, and of the protection given to them in their business enterprises in this country by the Constitution of the United States, is given in the opinion of this Court in the case of Terrace *v.* Thompson, decided November 12, 1923 (United States Supreme Court Advance Opinions 1923-1924, No. 3, p. 35), which dealt with the contention that certain provisions of the Anti-alien Land Law of California were in conflict with the due process and equal protection clauses of the 14th Amendment and with the treaty between the United States and Japan of February 21, 1911 (37 Stat. at L., 1504). This Court, after declaring again that the Constitution of the United States

protects the alien inhabitant of the United States "in his right to earn a livelihood by following the ordinary occupations of life" (p. 37), and that "alien inhabitants of a state, as well as all other persons within its jurisdiction, may invoke the protection" of the due process and equal protection clauses of the 14th Amendment (p. 38), quoted (p. 40) from the provisions of the aforesaid treaty with Japan as follows:

> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is well known that under these treaty provisions and Constitutional protection a considerable number of Japanese corporations are actively engaged within the United States in the business of exporting, and are competing with American corporations engaged in like business, and that some of these Japanese corporations have employed capital in such business in the United States to the extent of many millions of dollars, with extensive stores, warehouses, etc. It is also well known in commercial circles that such Japanese, with other Asiatic or foreign, corporations now carry on a large part of the

foreign commerce of the United States with Asiatic countries, having been greatly assisted by the total exemption from the payment of tax on net income or profits derived from their export trade.

Similar treaties, with similar provisions permitting the corporations of foreign countries to lease or acquire factories, warehouses, etc., and to carry on any kind of manufacturing or commercial business in the United States on the same terms as American corporations, have been made between the United States and practically all the other civilized countries in the world; and under the decisions of this Court herein referred to it is clear that if such treaties had provided, as the Act of Congress in the case of the plaintiff in error provides, that corporations organized under the laws of such foreign countries should be favored by entire immunity from taxation or preferential treatment in export trade as compared with American citizens or corporations, *such provision in such treaties would be contrary to due process of law.*

Income from the Business of Manufacturing Goods in One Jurisdiction and Selling the Same in Another.

In Underwood Typewriter Co. *v.* Chamberlain (254 U. S. 113) this Court dealt with a law taxing net income enacted by the State of Connecticut. In that case the Underwood Typewriter Company, a corporation organized under the laws of the State of Delaware, was engaged in the business of manufacturing typewriters and kindred articles in Connecticut and selling most of such

products through branch offices outside of that State. It was contended by that company (1) that the tax burdened interstate commerce and hence was void under Section 8 of Article 1 of the Federal Constitution, and (2) that the tax violated the 14th Amendment because, directly or indirectly, it was imposed on income arising from business conducted beyond the boundaries of the State.

This Court sustained the tax and in the opinion, delivered by Mr. Justice Brandeis, the facts are stated as follows (on pp. 118, 119):

> "The Underwood Typewriter Company is engaged in the business of manufacturing typewriters and kindred articles; in selling its product and certain accessories and supplies which it purchases; and in repairing and renting such machines. Its main office is in New York City. All its manufacturing is done in Connecticut. It has branch offices in other states for the sale, lease, and repair of machines and the sale of supplies; and it has one such branch office in Connecticut. All articles made by it—and some which it purchases—are stored in Connecticut until shipped direct to the branch offices, purchasers, or lessees. In its return to the tax commissioner of Connecticut, made in 1916, under the above law, the company declared that its net profits during the preceding year had been derived principally from tangible personal property; that these profits amounted to $1,336,586.13; that the fair cash value of the real estate and tangible personal property in Connecticut was $2,977,-827.67, and the fair cash value of the real estate

> and tangible personal property outside that state was $3,343,155.11. The proportion of the real estate and tangible personal property within the state was thus 47 per cent. The tax commissioner apportioned that percentage of the net profits, namely $629,668.50, as having been earned from the business done within the state, and assessed thereon a tax of $12,593.37, being at the rate of 2 per cent. The company, having paid the tax, under protest, brought this action in the superior court for the county of Hartford, to recover the whole amount."

In dealing with the first contention the Court (referring to Shaffer *v.* Carter, 252 U. S. 37) said (on p. 120):

> "*This tax is upon the net profits earned within the State.* That a tax measured by net profits is valid although these profits have been derived in part, or indeed mainly, from interstate commerce is settled." (The italics are ours.)

Since the income of the Underwood Typewriter Company from goods manufactured by it in Connecticut and shipped to and sold by it in other states was earned in Connecticut, it must likewise be true that the income of foreign corporations, from goods manufactured by them within the United States and exported and disposed of or sold in foreign countries by such foreign corporations, was earned within the United States.

As to the second contention by the Underwood

Typewriter Co. (*supra*) the Court said (on pp. 120, 121):

> "It is contended that the tax violates the 14th Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the state. In considering this objection, we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the state, or a direct tax upon that income; for 'the argument upon analysis resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution'. Shaffer *v.* Carter, 252 U. S. 37, 55, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221. In support of its objection that business outside the state is taxed, plaintiff rests solely upon the showing that, of its net profits, $1,293,642.95, was received in other states and $42,942.18 in Connecticut; while, under the method of apportionment of net income required by the statute, 47 per cent. of its net income is attributable to operations in Connecticut. But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut, and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It therefore adopted a method of apportionment which, for all

that appears in this record, reached, and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of this case', as stated by the supreme court of errors, 'carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs'. 94 Conn. 47, 108 Atl. 159. The corporation has not even attempted to show this; and, for aught that appears, the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result."

In comparing the facts stated in the opinion of the Attorney General (*supra*) with respect to R. Burleigh & Sons (*supra*), a corporation organized under the laws of Scotland, with those stated in Underwood Typewriter Co. *v.* Chamberlain (*supra*) with respect to the Underwood Typewriter Co., a corporation organized under the laws of Delaware, it is important to note that in each case the goods were manufactured in one jurisdiction, removed therefrom, and disposed of or sold by the manufacturers in another jurisdiction. In the former case the source of the income under the Act of Congress as construed by the Attorney General is regarded as the foreign country

in which the goods were sold by the manufacturers, while in the latter case the source of the income was determined by this Court to be the State of Connecticut where the goods were manufactured. And with respect to that which actually constitutes source of income, it is also important to note that the laws enacted by Congress, following the Federal income tax law of 1866 and prior to the European war, taxing the net income of foreign corporations engaged in business in the United States, provided that such corporations should pay tax on all net income derived from capital invested and business transacted by such corporations within the United States, which is equivalent to saying that the source of such income is the United States regardless of the country in which the goods are sold.

With reference to the wording of Section 233(*b*) of the Revenue Act of 1918 (*supra*), it is evident that Congress fully intended to exempt from tax net income derived from the manufacture of goods within the United States by foreign corporations which were exported and disposed of, or sold, in foreign countries by such foreign corporations, and hence the Attorney General construed the law of 1918 in accordance with its manifest intent. It seems scarcely necessary to say, since, as stated by Judge Cooley (p. 45, *infra*), *"taxation is the equivalent for the protection which the Government affords to the persons and property"* within its jurisdiction, and as stated in Shaffer *v.* Carter (*supra*), without such protection *"gainful occupation would be impossible"*, that Congress in exempt-

ing from tax such income of foreign corporations ignored the underlying principle on which all taxation is based, and, as shown by the reasoning in both Underwood Typewriter Co. *v.* Chamberlain (*supra*) and Shaffer *v.* Carter (*supra*), the actual source of such income is the capital invested and business transacted within the United States by such foreign corporations. It is therefore certain, not only that the discriminating tax on the income of the plaintiff in error derived from its business of exporting carried on within the United States was contrary to due process of law, but also that such tax imposed a direct burden on such business in violation of Paragraph 5 of Section 9 of Article I of the Constitution.

Disadvantages Encountered by American Corporations in Export Trade.

In further illustration of the competitive disadvantages to which our American corporations engaged in foreign trade were subjected by the discriminating taxation which is complained of in the case of the plaintiff in error, it is to be noted that Canada and Great Britain, with whose people our exporters must compete in world markets, give to their corporations exemption from their income taxes with respect to trade outside of their own countries. For example, Canada, in her Income Tax Law (7 and 8 Geo. V., c. 28, as amended in 1918) exempted from tax

> "the income of incorporated companies whose business and assets are carried on and situated entirely outside of Canada."

Similarly, it was decided in Great Britain (Egyptian Hotels, Ltd. *v.* Mitchell (1915) H. L.) that under the British Income Tax Law a British corporation which had amended its Articles of Association so as to permit its business in Egypt to be managed by directors there, and had so managed and directed its business there, was not doing business in the United Kingdom or due to pay income tax to the United Kingdom with respect to its Egyptian business, notwithstanding that the corporation had a General Board of Directors in England and raised its capital there.

The effect of these and other similar provisions by other great commercial nations whose corporations compete with our own in the difficult struggle for foreign trade, is that such foreign corporations, doing business in the United States and producing or purchasing commodities here and selling them in any part of the world outside of their own countries, have paid no income tax to their home governments on the proceeds of such trade. Such proceeds of such trade came back to such foreign corporations in the United States undiminished by such taxation either here or abroad, except that which was paid in the countries where the goods were sold, increasing, of course, their working capital and financial resources here, while like proceeds of like trade by American corporations were compelled to pay the heavy taxes of the Revenue Act of 1918.

Cooley on the Restrictions Imposed by the "Due Process of Law" Provisions.

In Judge Cooley's works on Taxation and Constitutional Limitations the principles settled by the courts with respect to the meaning and purpose of the constitional guarantee of "due process of law" as applied to taxation have been very clearly stated, and the following citations from Judge Cooley's works set forth the restrictions imposed by the "due process of law" provisions of the Constitution.

In Cooley on Taxation (Third Edition), in the chapter entitled "Taxation and Protection Reciprocal", it is said (Vol. I, p. 23):

> "Alienage itself does not work an exemption if the alien is domiciled in the country, so far at least as he has property there to be protected by its laws; and tangible property in the country, as stock in trade or manufacture, or for sale, is taxable irrespective of the residence or allegiance of owners."

In the chapter entitled "Equality and Uniformity in Taxation" it is said (Vol. I, pp. 259-261):

> "It has already been stated that inequality does not necessarily follow the restricting of a tax to a few subjects only or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax exclusively on merchants' goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the con-

sumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a particular portion of the taxing district or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of moneys were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

In Cooley's Constitutional Limitations it is said (on pp. 707 and 708):

"Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike pro-

tected, so all alike should bear the burden, in proportion to the interests secured. Taxes by the poll are justly regarded as odious and are seldom resorted to for the collection of revenue; and when taxes are levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions."

And (on page 723):

"To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by an enlightened or responsible government."

In the Fourth Edition (1924) of Cooley on The Law of Taxation, among the citations and references relating to classification for purpose of taxation, are the following:

Vol. I, Sec. 143, p. 336.

"Thus, imposing a tax upon part only of those belonging to the same class has been expressly held to violate a due process clause in a State constitution, where no justification or reason exists for the classification."

State *v.* Crosson, 33 Idaho 140, 190 Pac. 922.

Vol. I, Sec. 334, p. 713.

"There must be a reason for the classification as distinguished from mere accident, whim, caprice or vindictiveness."

Magoun *v.* Ill. Trust & Savings Bank, 170 U. S. 283.

Gulf C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150.

Detroit G. H. & M. R. Co. *v.* Fuller, 205 Fed. 86.

Nashville, C. & St. L. R. Co. *v.* Taylor, 86 Fed. 168.

Vol. I, Sec. 334, p. 717.

"Classification is allowed in order to avoid or correct inequalities—never to create them. (Com. *v.* Alden Coal Co., 251 Pa. 134, 96 Atl. 246). Classification should be according to some reasonable, practical rule, drawn from experience, which will prevent a gross inequality in the burden of taxation." (Com. *v.* Delaware Div. Canal Co., 123 Pa. 594, 16 Atl. 584).

Vol. I, Sec. 340, p. 723.

"Discrimination between persons or property in like situation cannot be effected by classification, since there can be no reason therefor. Omissions from a class, of subjects that clearly belong to such class, make the classification invalid."

State *ex rel.* Hildebrant *v.* Fitzgerald, 117 Minn. 192, 134 N. W. 728.

Vol. I, Sec. 341, p. 728.

"Of course a land tax of so much an acre upon the land of nonresidents is discriminatory where no such tax is imposed on the land of residents."

White River Lumber Co *v.* Elliott, 146 Ark. 551, 226 S. W. 154.

Vol. I, Sec. 350, p. 748.

"Taxes on privileges and occupations need not be equal in amount as between different occupations * * * but it is sufficient that the burden imposed falls alike on all persons who are in substantially the same situation."

In re Watson, 17 S. D. 486; 97 N. W. 463.

Vol. I, Sec. 352, p. 750.

"Where a classification is made for an occupation tax, the tax levied must be uniform upon each member of that class."

Ex parte Thornton, 4 Hughes 220.

Vol. I, Sec. 356, p. 767.

"Residence cannot be made the basis of discrimination in taxation of persons engaged in the same occupation or profession."

State *v.* Doran, 28 S. D. 486; 134 N. W. 53.

Vol. I, Sec. 362, p. 782.

"Imposing a license tax on employers of foreign-born unnaturalized laborers is an arbitrary and illegal classification and discriminates against members of the same class."

Juniata Limestone Co. *v.* Fagley, 187 Pa. St. 193; 40 Atl. 977.

Vol. II, Sec. 543, p. 1196 (foot note).

"A legislative act which is in effect a selection of individuals from a general class for taxation is not sustainable by showing that it is no more onerous a burden than they should bear; 'this fact does not affect the question of legislative power, and cannot give validity to the act'."

Albany, etc., Bank *v.* Maher, 9 Fed. 884.

Vol. II, Sec. 585, p. 1257.

"So citizenship is immaterial if the person is a resident, since personal allegiance has no necessary connection with the right of taxation (Pendleton *v.* Com., 110 Va. 229; 65 S. E. 536); and hence an alien may be taxed as well as a citizen."

Witherspoon *v.* Duncan, 4 Wall. 210;

Mager *v.* Grima, 8 How. 490;

People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Vol. IV, Sec. 1712, p. 3427.

"A particular person cannot be exempted from payment of an occupation tax on a specified occupation, unless there is constitutional authority therefor."

City of Mobile *v.* Kierman, 170 Ala. 449; 54 So. 102.

Vol. IV, Sec. 1752, p. 3486 (foot-note).

"So far as state income taxes are concerned, classification is proper if there is no discrimination in favor of one as against another of the same class."

State *ex rel.* Atwood *v.* Johnson, 170 Wis. 218; 175 N. W. 589.

The Meaning of Due Process of Law as Defined by the Supreme Court.

In Dent *v.* West Virginia (129 U. S. 114) this Court very clearly defined the meaning of the "due process of law" clause, which appears in both the Fifth and Fourteenth Amendments of the Constitution. The Court said (on pp. 121-124):

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.
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> * * * * * *
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> "As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there

designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land'. *In this country, the requirement is intended to have a similar effect against legislative power,* that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation upon the subjects to which it relates,* and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case. *The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens."* (The italics are ours.)

And this Court has determined also that legislation is arbitrary and capricious when it makes a discrimination depending on nationality or allegiance. In American Sugar Refining Co. *v.* Louisiana (179 U. S. 91) this Court had under consideration a statute of Louisiana imposing a license tax on the business of refining sugar and molasses, in which it was provided that the tax should not apply to "planters and farmers grinding and refining their own sugar and molasses". It was contended that this discrimination was in violation of

the Fourteenth Amendment of the Constitution. The Court said (on p. 92):

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. *Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations,* or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws of the less favored classes." (The italics are ours.)

It is thus clearly established that discrimination in taxation which is made to depend on nationality or allegiance, as in the law in the case of the plaintiff in error, is arbitrary, oppressive or capricious, and hence in violation of the "due process of law" provision of the Fifth Amendment of the Constitution.

In Lappin *v.* District of Columbia (22 App. D. C. 68) the principles laid down by this Court with respect to the taking of property without due process of law were summed up and applied to the taxation imposed by the Act of Congress of July 1, 1902 (32 Stat. at L., Chap. 1352), whereby general brokers in the District of Columbia paid a license tax of $250.00 per year, and brokers who were members of regular exchanges located outside of the District of Columbia and transacting a brokerage business therein paid a license tax of

only $100.00 per year. The Court of Appeals of the District of Columbia in that case, citing Dent *v.* West Virginia (*supra*), held that this discriminating tax was in violation of the "due process of law" clause of the Fifth Amendment, and said:

> "The undoubted right to pursue any legitimate trade, calling or profession, subject only to such reasonable regulations in the interest of the public welfare as may be imposed upon all persons under like conditions, 'may, in many respects be considered as a distinguishing feature of our republican institutions.' Dent *v.* West Virginia, 129 U. S. 114. And, as was said in that case: 'The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors and cannot arbitrarily be taken away from them any more than their real and personal property can be thus taken. See also Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. and S. H. Co., 111 U. S 757; Curry *v.* District of Columbia, 14 App. D. C. 423, 411.
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> "If then, the direct prohibition of one person or class of persons from engaging in a calling that is open to others similarly situated is clearly beyond the legislative power, it must follow that the same purpose cannot be indirectly accomplished through arbitrary taxation imposing upon one a burden greater than that to be borne by the others. As was said in Curry *v.* District of Columbia, 14 App. D. C. 423, 441: *'If discrimination is allowable, prohibition is allowable; and both are equally obnoxious to our free institutions. Indeed, to our*

ordinary sense of justice, discrimination is more obnoxious than prohibition.'"

* * * * * *

"The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors upon less onerous terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefore within the prohibition of the 5th Amendment of the Constitution." (The italics are ours.)

Aliens in the United States Protected by the Due Process of Law Provisions of the Constitution.

The principle expressed by the "due process of law" provision of the Fifth and Fourteenth Amendments was very clearly stated by this Court in Yick Wo *v.* Hopkins (118 U. S. 356). That case dealt with an ordinance of the city and county of San Francisco, which made it unlawful for any person or persons to carry on a laundry there without having first obtained the consent of a Board of Supervisors "except the same be located in a building constructed either of brick or stone". Although this ordinance appeared to be fair on its face, yet its necessary effect, as stated by this Court, was to drive the Chinese laundries out of business, and hence the ordinance deprived the proprietors of such laundries of their property without due process of law.

In the statement of the case by Mr. Justice Matthews, it was said (on p. 362):

> "* * * And if, by an ordinance, general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the National Constitution, then the insertions of provisions to guard the rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the city and county of San Francisco, to the adjoining counties, beyond the convenient reach of customers, either of which results would be little short of confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result."

And in the opinion of the Court, delivered by Mr. Justice Matthews, it was said (on pp. 373, 374):

> "* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an

> evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Applying the principle of this decision to the case of the plaintiff in error, an American corporation carrying on the business of manufacturing for export and exporting, it is clear that such a deprivation of property as was sought to be inflicted upon the Chinese by the discriminating ordinance of San Francisco has been inflicted contrary to due process of law upon the plaintiff in error in its said business by the discrimination complained of in the case at bar. With its income from such business heavily taxed while the like income of foreign corporations and nonresident alien individuals engaged in such business is entirely exempted from tax, the effect is necessarily to drive such business out of the hands of the plaintiff in error or other American corporations so taxed, and into the hands of the exempted foreign corporations and alien individuals, with the loss by the American corporations of the capital invested by them in such business.

In the opinion in Brushaber *v.* Union Pacific R. R. Co. (240 U. S. 1), delivered by Mr. Chief Justice White, this Court said (on page 24):

> "So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon

the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that *this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*"

It is submitted that it would be impossible to draft a law taxing income which would be more *"wanting in basis for classification"* or wherein any more *"gross and patent inequality" in taxation would result* than that which is complained of by the plaintiff in error in the case at bar. Compared with the competing foreign corporations the occupation is the same (the business of manufacturing goods within the United States, exporting such goods, and selling or disposing of them in foreign countries); the circumstances and conditions under which this competition is carried on are identical; and hence it would be impossible to discriminate against the plaintiff in error in this case without basing the classifi-

cation on *nationality or allegiance,* or something equally arbitrary and capricious, *which is precisely what this Court has said Congress cannot do without thereby taking property contrary to due process of law.*

The Fundamental Principle of Equality of Application of the Law.

In Truax *v.* Corrigan (267 U. S. 334) this Court, speaking by Mr. Chief Justice Taft, said (on p. 332):

> "The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal government, while the equality clause does not appear in the 5th Amendment, and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Hurtado *v.* California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. *Our whole system of law is predicated on the general*

> *fundamental principle of equality of application of the law.* 'All men are equal before the law'; 'This is a government of laws, and not of men'; 'No man is above the law',—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws." (The italics are ours.)

It is submitted that this "general fundamental principle of equality of application of the law", has been violated in the case of the plaintiff in error, since under the Revenue Act of 1918 it was taxed on income from its business of manufacturing for export and exporting when foreign corporations engaged in like business within the United States, under the same or like circumstances and conditions, were wholly exempted from like taxation.

In Hurtado *v.* People of California (110 U. S. 516) this Court said (on p. 536):

> "* * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the

power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In Smyth *v.* Ames (169 U. S. 466) this Court said (on p. 527):

"The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

In Hayes *v.* Missouri (120 U. S. 68) this Court said (on pp. 71, 22):

"The Fourteenth Amendment of the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike,

under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier *v.* Connelly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' 113 U. S. 27, 32."

The Due Process of Law Principle Applied to Income Tax with Respect to Situation Like That of the Plaintiff in Error.

In Shaffer *v.* Carter (252 U. S. 37) this Court dealt with a law enacted by the State of Oklahoma taxing the net income of its residents from whatever source derived. With respect to nonresidents this law provided that a like tax "shall be levied, assessed, and collected and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on" therein by persons residing elsewhere.

It was contended by Shaffer, who resided in Illinois and carried on an oil business in Oklahoma, and shipped to, and sold in other States or foreign countries, the products of such business, that (1) the tax burdened interstate commerce in contravention of Section 8 of Article I of the Constitution; and (2) that Oklahoma

was without jurisdiction to impose such tax on non-residents.

As to the contention that the tax burdened interstate commerce, the Court, in the opinion delivered by Mr. Justice Pitney, said (on p. 57):

> "It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499. Ann. Cas. 1918E, 748. Compare William E. Peck & Co. *v.* Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432."

And (on p. 59):

> "Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the *lien will rest upon the same property interests which were the source of the income upon which the tax was imposed.*" (The italics are ours.)

With reference to the liability of nonresidents to pay tax on net income arising from sources within a State, the Court said (on pp. 50, 51):

> "*In well ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement.* That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.
>
> Income taxes are a recognized method of distributing the burdens of government, *favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay.*" (The italics are ours.)

And (on pp. 52-54):

> "And we deem it clear, upon principle as well as authority, that just as a state may impose gen-

eral income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to nonresidents. (New Orleans *v.* Stempel, 175 U. S. 309, 320, *et seq.*, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; Bristol *v.* Washington County, 177 U. S. 133, 145, 44 L. ed. 701, 707, 20 Sup. Ct. Rep. 585; Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L. E. A. 1915C, 903. 31 Sup. Ct. Rep. 550), and sustaining Federal taxation of the income of an alien nonresident derived from securities held in this country (DeGanay *v.* Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524.)"

The Court, after stating that Shaffer was not entitled *"to any preferential treatment as compared with resident citizens"* and that the Constitution gave him *"no right to be favored by discrimination or exemption"*, cited the income tax laws enacted by Congress since 1861 and called attention to the fact that the income tax law of 1913 (38 Stat. at L. 166, 4 Fed. Stat. Anno. 2nd Ed. p. 326) which imposed tax upon the entire net income from "all property owned and of every business, trade, or profession carried on in the

United States by persons residing elsewhere" evidently furnished the model for Section 1 of the Oklahoma statute taxing nonresidents. The Court then said (on p. 54):

> *"No doubt is suggested* (the former requirement of apportionment having been removed by constitutional amendment) *as to the power of Congress thus to impose taxes upon incomes produced within the borders of the United States or arising from sources located therein even though the income accrues to a nonresident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the 14th Amendment imposes no greater restriction in this regard upon the several states than the corresponding clause of the 5th Amendment imposes upon the United States."* (The italics are ours.)

It is submitted that the only interpretation which can be placed on the above paragraph, with respect to the issue in the case of the plaintiff in error, is that the due process clause of the 5th Amendment restricts Congress to the condition that income taxes derived from the business of manufacturing for export and exporting, in order to be valid, must be imposed equally on all persons under like circumstances and conditions. The conclusion is unavoidable, that when, as in the law under consideration in the case of the plaintiff in error, the discrimination is made to depend on nationality or allegiance, which under the fundamental requirement governing both Federal and

State taxation can have no reasonable relation to the business of manufacturing for export and exporting carried on within the United States by foreign corporations, then the imposition by Congress of the tax upon the income of the plaintiff in error as an American corporation was in violation of the due process clause of the 5th Amendment.

The Tax Discrimination Against Plaintiff in Error in Violation of Due Process of Law.

In Raymond *v.* Chicago Union Traction Co. (207 U. S. 20) this Court held that the assessment, by the state board of equalization of Illinois, of the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which resulted in enormous disparity and discrimination, was in violation of the "due process of law" and "equal protection of the laws" provisions of the 14th Amendment of the Constitution of the United States. And in Truax *v.* Raich (239 U. S. 33) this Court again declared that a discrimination against aliens in the United States with respect to "the ordinary means of earning a livelihood", "because of their race or nationality", was in violation of the 14th Amendment. The Court said (on pp. 41, 42):

> "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction.

> But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, *because of their race or nationality, the ordinary means of earning a livelihood.* It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of this Amendment to secure. * * * *If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.* It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare'. The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved." (The italics are ours.)

And (on p. 43):

> "The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law."

It is settled that corporations are persons within the meaning of the "due process of law" and "equal protection of the laws" clauses of the 14th Amendment and of

the "due process of law" clause of the 5th Amendment; and hence it is clearly settled by this Court that a discrimination in taxation against American corporations in a lawful business in the United States, and in favor of alien corporations carrying on like business in the United States, is in violation of the "due process of law" clause of the 5th Amendment, for it cannot be seriously suggested that a discrimination which violates this clause when it is directed against the alien does not violate the clause when directed against the citizen. To so contend would be equivalent to asserting that Congress has power to force American citizens to expatriate themselves in order to *"obtain support in the ordinary fields of labor"* or to protect their property in the United States from injury or confiscation. In the decision of this Court in Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. and S. H. Co. (111 U. S. 746) it was said (in the concurring opinion by Mr Justice Field, on p. 757):

> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. *The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.*" (The italics are ours.)

And in Soon Hing *v.* Crowley (113 U. S. 703), this Court also said (on p. 709) that

> "the discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

In Heisler *v.* Thomas Colliery Co. (260 U. S. 245) this Court dealt with the contention that the imposition by the State of Pennsylvania of a special tax on anthracite coal mined and prepared for market in that State, without the imposition of a like tax on bituminous coal, thereby denied to the plaintiff in that case the equal protection of the laws guaranteed by the 14th Amendment. The Court, by Mr. Justice McKenna, said (on p. 255):

> "In its exercise in taxation, we have said, it is competent for a state to exempt certain kinds of property and tax others, *the restraints upon it only being against clear and hostile discriminations against particular persons and classes.*" (The italics are ours.)

So if the law in that case had exempted from the tax all anthracite coal mined in Pennsylvania by corporations not organized under the laws of Pennsylvania and sold by them beyond the borders of that State, it is clear that it would be held that such tax could not be applied to the coal mined by a Pennsylvania corporation, because in such case the hostile discrimination

would have been "against particular persons and classes", and hence in violation of both the due process of law and the equal protection of the laws clauses of the 14th Amendment. This is exactly the situation of the plaintiff in error in the case at bar.

In Southern Railway Co. *v.* Greene (216 U. S. 400), this Court said (on p. 418):

> "It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the 14th Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution."

In Flint *v.* Stone Tracy Co. (220 U. S. 142), which dealt with an excise tax imposed with respect to the carrying on or doing business by corporations meas-

ured by net income, this Court, in commenting on its opinion in Southern Railway Co. *v.* Greene (*supra*) said (on p. 161):

> "It is insisted in some of the briefs assailing the validity of this tax that these cases have been modified by Southern R. Co. *v.* Greene, 216 U. S. 400. In that case a corporation organized in a state, other than Alabama, came into that state in compliance with its laws, paid the license tax and property tax imposed upon other corporations doing business in the State, and acquired, under direct sanction of the laws of the state, a large amount of property therein, and, when it was attempted to subject it to a further tax on the ground that it was for the privilege of doing business as a foreign corporation, when the same tax was not imposed upon state corporations doing precisely the same business, in the same way, *it was held that the attempted taxation was merely arbitrary classification, and void under the Fourteenth Amendment.* In that case the foreign corporation was doing business under the sanction of the state laws no less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a state corporation doing the same business in the same way." (The italics are ours.)

Since the attempted taxation in Southern Railway Co. *v.* Greene (*supra*) *"was merely arbitrary classification"*, it must have been in violation of both the "due

process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment; and hence the declaration of this Court in that case fully sustains the contention of the plaintiff in error in the case at bar that its property was taken contrary to "due process of law".

In Western Union Telegraph Co. *v.* Frear (216 Fed. 199) the Court said (on p. 202):

> "Any attempt to substantially discriminate between domestic corporations and foreign corporations admitted to do business in a state, prejudicial to the latter, is invalid, whether it be by unequal taxation or other substantial inequality."

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (247 U. S. 165, cited on pp. 81-84, *infra*), this Court, in dealing with the net income of an American corporation derived from its exporting business carried on in the United States, which business, as the Court stated, consisted of "buying goods in the several States, shipping them to foreign countries and there selling them", declared that the status of the net income from such business *"is not different from that of the exported articles prior to the exportation"*. It is evident that if such net income did not have such status, it would necessarily be related to the activities of exporting, and hence to tax it would be in violation of Paragraph 5 of Section 9 of Article 1 of the Constitution. That a tax on such net income, irrespective of whether the goods are sold within or without the state, is like a tax on property in the state, is stated by this Court in United

States Glue Co. *v.* Oak Creek (247 U. S. 321, cited on pp. 90, 91, *infra*), and in Underwood Typewriter Co. *v.* Chamberlain (*supra*); and is confirmed in Shaffer *v.* Carter (*supra*). Hence, if Congress is not restrained by the "due process of law" clause of the Fifth Amendment from making the discrimination in favor of foreign corporations which is complained of in the case of the plaintiff in error, with respect to the business of manufacturing for export and exporting, carried on in the United States, then Congress would not be restrained from making a discrimination exempting foreign corporations from the payment of customs duties on articles imported into the United States while imposing such duties on American corporations; or from making a discrimination exempting foreign corporations from the sales taxes paid by manufacturers, producers, and importers on domestic sales, while imposing such taxes on such sales by American corporations; or from making a discrimination exempting foreign corporations in the business of insurance, or banking, or building, or any other business in the United States, from income or profits tax, or capital stock tax, or any other sort of tax which Congress can impose, while levying such tax upon American corporations engaged in like business. To use the words of this Court in Shaffer *v.* Carter (*supra*), such a proposition would be so wholly inconsistent with fundamental principles as to be refuted by its mere statement.

The Opinion of the District Court.

In the opinion of the District Court, it is said (Record, pp. 7, 8):

> *"It is admitted by the Government that the Acts of 1909 and 1913, the wording of which differs slightly from that of the Act of 1918, were in practice applied, at least to some extent, to foreign corporations in respect of income derived from the sale in foreign countries of goods manufactured or acquired in the United States.* It is unnecessary, however, here to consider the proper interpretation to be given to the Acts of 1909 and 1913 or the Act of 1918 as applied to foreign corporations, since I am satisfied of the constitutionality of the law as applied to the plaintiff, even though the income of foreign corporations from like sources is construed to be exempt.
>
> There is, as is now conceded, no question as to the power of Congress to tax the net income of domestic corporations derived from their export business. The question as to how far it is wise and proper to extend our taxing laws to foreign corporations that manufacture or acquire goods in this country and sell them abroad, involves many economic and political considerations. These are peculiarly within the province of Congress, not the Courts.
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> * * * * * *
>
> * * * So long as the tax on the American corporations is measured by net income, actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for

any particular contracts, even if it could be assumed that foreign competitors were subject to no equivalent taxation by their own governments. Clearly, however, such a handicap or discrimination does not make the classification such a grave abuse or oppression as to condemn the law as a denial of due process within the Fifth Amendment. For to bring it within this condemnation it must be, as the Supreme Court said in Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1, 24, 25:

> 'A case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.'

In La Belle Iron Works *v.* United States, 256 U. S. 337, 392, 393, the Court again points out:

> 'The Fifth Amendment has no equal protection clause, and the only rule of uniformity prescribed with respect to duties, imports, and excises laid by Congress is the territorial uniformity required by Art. 1, Sec. 8, * * *. The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required by the States under the equal protection clause, much less of Congress under the more general

> requirements of due process of law in taxation. * * * The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. * * * If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the tests applied'."
>
> (The italics are ours.)

This opinion states the admission by the Government that under the Act of Congress of August 5, 1909 (36 Stat. at L., Ch. 6), and the Act of Congress of October 3, 1913 (38 Stat. at L., Ch. 16) the foreign corporation transacting the business of exporting within the United States with capital invested within the United States in such business was taxed upon its income from such business (see pp. 19-21, *supra*).

As to the view of the District Court that Congress may discriminate in its taxing laws by exempting "foreign corporations that manufacture or acquire goods in this country and sell them abroad" while taxing domestic corporations doing the same thing, for the reason that the taxation of such foreign corporations "involves many economic and political considerations", it is sufficient to say that if such considerations could be invoked to set aside the Constitutional requirement that all persons engaged in the same occupation in the United States under the same circumstances and conditions must be treated alike with respect to taxation,

then all rights of life, liberty or property would be at the mercy of Congress. The statement of the District Court is to the effect that Congress, for its own reasons of policy, whatever they may be, can tax the export trade carried on here by our own people at any rate while exempting entirely the like trade carried on here by persons or corporations of foreign allegiance, discriminating against our own people solely on the ground of nationality or allegiance of those favored by exemption. If Congress can do this with respect to export trade, it can, of course, do likewise with respect to import trade, or with respect to any trade or business carried on in any part of the United States.

As to the statement by the District Court that "so long as the tax on American corporations is measured by net income actually realized, it is difficult to see that the American corporations are seriously handicapped in competing for any particular contracts even if it could be assumed that foreign competitors were subject to no equivalent taxation by their own governments", it may be said that the complaint in the case of the plaintiff in error relates entirely to the discrimination against its business of exporting in the taxation imposed by the Congress of the United States, and is not concerned with the taxation imposed by the governments of foreign countries. As a matter of fact, the taxation of income or other taxation imposed by foreign governments upon the business activities carried on within their jurisdiction always falls alike upon all who carry on such activities

there, whether their own people or aliens; and all such taxes are expenses deducted in computing net income taxed by the United States.

With reference to the citations by the District Court from Brushaber *v.* Union Pacific R. R. Co. (*supra*) and La Belle Iron Works *v.* United States (*supra*), it is submitted that they fully sustain the contention of the plaintiff in error. Applying the language of the Court in the Brushaber case, it is clear that the law in the case at bar *"was so wanting in basis for classification as to produce a gross and patent inequality"* because the discrimination against the plaintiff in error was made to depend *wholly upon difference of nationality or allegiance,* which discrimination this Court has declared would be arbitrary, capricious, or oppressive.

In La Belle Iron Works *v.* United States (*supra*) the Court said (on p. 393):

> "The Act treats all corporations and partnerships alike, so far as they are similarly circumstanced. *As to one and all, Congress adjusted this tax, generally speaking, on the basis of excluding from its operation income to the extent of a specified percentage (7 to 9 per cent) of the capital employed, but upon condition that such capital be valued according to what actually was embarked at the outset or added thereafter, disregarding any appreciation in values.* If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to difference in their circumstances, not to any

uncertainty or want of generality in the test applied." (The italics are ours, and the words italicized were omitted from the citation by the District Court.)

In the case at bar there was no difference in the circumstances and conditions under which the business of manufacturing for export and exporting was carried on by the plaintiff in error and foreign corporations, nor was the law general in its operation, since, in the same occupation or business within the United States, it taxed the net income of the plaintiff in error derived therefrom, and entirely exempted from tax the like income of foreign corporations, and hence it is clear that the reasoning of this Court in both of the cases cited by the District Court sustains the contention of the plaintiff in error.

SECOND.

The said alleged taxation imposed upon the said net income of profits of the plaintiff in error's said business of manufacturing goods in the United States for export and exporting and disposing of such goods in foreign countries, transacted in the United States with capital invested in the United States by the plaintiff in error, constituted a direct burden on and impediment to the plaintiff in error's said business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State", inasmuch as the like net income or profits of said foreign corporations accruing or derived from the said like business of manufacturing goods in the United States for export and exporting and disposing of said goods in foreign countries, transacted in the United States with capital invested in the United States by said foreign corporations, was wholly exempted under the same law from like taxation.

The Decision in the Peck Case.

In William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*), this Court dealt with the general tax of one per cent. on net income imposed by the Income Tax Law of 1913. The plaintiff in that case was carrying on the business of exporting in the United States with capital invested in the United States. The Court,

in its opinion by Mr. Justice Van Devanter, said (on p. 172):

> "The plaintiff is a domestic corporation chiefly engaged in buying goods in the several States, shipping them to foreign countries and there selling them. In 1914 its net income from this business was $30,173.66, and from other sources $12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them."

In this opinion this Court held (on p. 173) that under Paragraph 5 of Section 9 of Article I of the Constitution, Congress is forbidden to tax articles in course of exportation; the act or occupation of exporting; bills of lading for articles being exported; charter parties for the carriage of cargoes from State to foreign ports; and policies of marine insurance on articles being exported; and then said (on pp. 173-175):

> * * * "In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring 'not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation.' Fairbank *v.* United States, 181 U. S. 292, 293. And the court has indicated that where the tax is not laid on the articles them-

selves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation Thames and M. M. Ins. Co. *v.* United States, 237 U. S. 25. In this view it has been held that the clause does not condemn or invalidate charges or taxes not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in Pace *v.* Burgess, 92 U. S. 372, and Turpin *v.* Burgess, 117 U. S. 504, and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in Cornell *v.* Coyne, 192 U. S. 418. In that case it was said, p. 427: 'The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.' "

* * * * * *

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid *generally* on net incomes. And while it cannot be applied to any in-

come which Congress has no power to tax (see Stanton *v.* Baltic Mining Co., 240 U. S. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, *or in a discriminative way,* but just as it is laid on other income. The words of the Act are 'net income arising or accruing from all sources'. There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. *Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.* If articles manufactured and intended for export are subject to taxation under *general* laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under *general* laws. *In that respect the status of the income is not different from that of the exported articles prior to the exportation.*" (The italics are ours.)

It is to be noted that in this decision the Court pointed out that the tax was "general" in its application and was not laid "on income from exportation because of its source or in a discriminative way." The tax was imposed likewise and equally upon all net income derived from the business of exporting transacted in the

United States, whether by American corporations and citizens or by foreign corporations and alien individuals resident or nonresident; and such net income, like net income from other sources, was taxed as an item of personal property which the recipient is free to use as he chooses, and which by virtue of the Sixteenth Amendment could be taxed as property in the United States without apportionment.

The Discriminating Tax a Burden on the Export Commerce of the Plaintiff in Error.

In the case at bar, however, the tax is not "general" in its operation upon the subject to which it relates, since it is laid "in a discriminative way" for the reason that the tax imposed upon the net income or profits of the plaintiff in error derived from the business of exporting transacted within the United States was not likewise imposed on the net income or profits of foreign corporations derived from the like business of exporting transacted by such foreign corporations within the United States with capital invested in said business by such foreign corporations within the United States. Hence such discrimination against the plaintiff in error imposed a direct and immediate burden on its business or occupation of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States, under the principle repeatedly declared by this Court, and which is clearly stated in I. M. Darnell & Son Co. *v.* Memphis (208 U. S. 113).

In that case the opinion of this Court, by Mr. Jus-

tice White, sets forth that the Constitution of the State of Tennessee adopted in 1870 provided that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees"; and that an act of the legislature of 1903, after providing that "all property—real, personal, and mixed—shall be assessed by taxation for state, county, and municipal purposes, except such as is declared exempt in the next section", provided further in the following section that there should be exempt from taxation "manufactured articles from the produce of the state in the hands of the manufacturer". In stating the case the Court said (on p. 116):

> "For more than three years prior to January 30, 1905, the I. M. Darnell Son & Company, a corporation of Tennessee, was domiciled in Memphis, in that state, and there owned and operated a lumber mill. Shortly prior to the date just named, pursuant to chapter 366 of the acts of Tennessee for 1903 (Tenn. Acts 1903, pp. 1097-1101), the value of the personalty of the Darnell Company was assessed for taxation by the city of Memphis at $44,000. Of this amount $19,325 was the value of logs cut from the soil of states other than Tennessee, which the company had brought into Tennessee from other states, and were held by the company as the immediate purchaser or vendee, awaiting manufacture into lumber, or consisted of lumber already manufactured by the company from logs which had been acquired and brought into the state from other states, as above mentioned, and all of which lumber was lying in the mill yard of

the company, awaiting sale. The Darnell Company protested against this assessment, asserting that it was not liable to be taxed on said sum of $19,325, the value of the property owned by it as the immediate purchaser of logs brought from other states, or lumber, the product thereof. The ground of the protest was that the property represented by the valuation in question could not be taxed without discriminating against it, as like property, the product of the soil of Tennessee, was exempt from taxation under the Constitution and laws of that state, and therefore to tax its said property would violate the commerce clause (Sec. 8, Article I) of the Constitution, and the equal protection clause of the 14th Amendment."

In the opinion holding that the tax collected from I. M. Darnell & Son Company imposed a direct burden upon interstate commerce since the law of Tennessee in terms discriminated against property the product of the soil of other States, notwithstanding that the property so taxed, as stated by this Court, "had come to rest and had been commingled with the mass of property within the State", the Court said (on pp. 120 and 125):

> "The leading cases announcing the doctrine that a state may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are Woodruff *v.* Parham and Brown *v.* Houston, *supra.* But in both those cases it was sedulously pointed out that the power which was thus recognized did not, and could not,

include the authority to burden the property brought from another state with a discriminating tax. In American Steel & Wire Co. *v.* Speed, 192 U. S. 519, 48 L. ed. 546, 24 Sup. Ct. Rep. 365, where the doctrine of Woodruff *v.* Parham and Brown *v.* Houston was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon interstate commerce, property so situated must be taxed 'without discrimination, like other property situated within the state'."

* * * * * *

"As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the state of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause of the 14th Amendment."

In Woodruff *v.* Parham (8 Wall. 123) cited in the Darnell case decision, this Court said (on p. 140):

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some

other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void."

And in Brown *v.* Houston (114 U. S. 622) cited also in the Darnell case decision, this Court said (on pp. 632, 633):

"* * * The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans * * *. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

* * * * * *

* * * "With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—pro-

> vided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed."

Since it is settled, by the decision in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) that the net income from the business of exporting in the United States has the same status as articles in the United States intended for exportation before exportation begins, that is to say, personal property at rest in the United States, and by the decision in I. M. Darnell & Son Co. *v.* Memphis (*supra*) that a tax upon such property, discriminating by means of an exemption with respect to the commerce through which the property came, is a direct burden upon such commerce, it is clear that the tax in the case of the plaintiff in error was a direct burden upon its export commerce.

It is settled that that which constitutes a burden upon interstate commerce must be a burden upon export commerce when applied thereto. In United States Glue Co. *v.* Oak Creek (247 U. S. 321) this Court dealt with a law enacted by Wisconsin taxing net income, and with the contention that certain items of the com-

pany's net income were not taxable because derived from interstate commerce. The Court applied to that case its decision in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*) relating to net income from export commerce, and said (on p. 329):

> "And so we hold that the Wisconsin Income Tax Law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, *and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business.*" (The italics are ours.)

In that case the Court explained the line of distinction between a tax upon the business of selling goods in foreign commerce measured by a percentage of the gross receipts, which is held unconstitutional no matter how small such percentage may be (Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292), and a tax upon such business measured by a percentage of the net income, such as was sustained in William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*). In explanation of this distinction this Court said (on pp. 328 and 329):

> "The difference in effect between a tax measured by gross receipts and one measured by net

income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. *Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profit has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, *like a tax upon property,* or upon franchises treated as property; and *if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government,* from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states." (The italics are ours.)

Comparing the declaration of this Court in William E. Peck & Co. *v.* John Z. Lowe, Jr. Collector (*supra*) that the tax was *"not laid on income from exportation because of its source or in a discriminative way"* with the similar declaration in United States Glue Co. *v.* Oak

Creek (*supra*) that a tax on income derived from interstate commerce was within the power of the states provided *"there be no discrimination against interstate commerce, either in the admeasurement of the tax or the means adopted for enforcing it"*, and comparing both declarations with the conclusion reached by this Court in I. M. Darnell and Son Co. *v.* Memphis (*supra*) to the effect that a tax on property in the State of Tennessee which had come to rest, and therefore was taxable by reason of its ownership, nevertheless imposed a direct burden on the interstate commerce through which it was brought into that state for the reason that like property the product of the soil of Tennessee was wholly exempt from like tax, it must necessarily follow that the tax on the net income of the plaintiff in error imposed a direct burden on its business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution, since foreign corporations carrying on the like business of exporting under the protection of the United States were wholly exempt under the law from like tax. And this burden was far more destructive in its effects than one resulting from a discrimination against all "exportation because of its source".

The Heavy Burden of the Tax.

It is to be noted that the tax in the case of William E. Peck & Co. *v.* John Z Lowe, Jr., Collector (*supra*) which tax, being *general* and not imposed in a discriminative way, was held to affect exportation only indirectly and remotely and not to be a direct burden on

exports, was at the low rate of one per cent. on net income, whereas the taxes imposed upon the net income of the plaintiff in error have been at much higher rates. While the income tax was at the low rate of one per cent., it was imposed alike upon all those engaged in the business of exporting in the United States; but when the rates of such tax rose to the highest figures ever imposed in the history of the country, the exemption for the foreign corporations was introduced, to add further to the burdens and difficulties of the exporting business of the plaintiff in error, a representative American corporation struggling to maintain its export trade. It was said by this Court in the case of William E. Peck & Co. *v.* John Z. Lowe, Jr., Collector (*supra*), reaffirming Brown *v.* Maryland (12 Wheat. 419), that the constitutional provision excepts from the range of the power of taxation "the act or occupation of exporting"; yet the plaintiff in error's acts and occupation of exporting have been taxed under the law here considered, by reason of this discrimination, at the rates of 10, 20, 30 or 40 per cent. or more of the net earnings of its exporting business. No argument is needed to show that discriminating taxation at such rates must necessarily have imposed a direct and destructive burden on the business of exporting carried on by the plaintiff in error, giving the foreign competing corporations such advantages as would ultimately force the plaintiff in error to abandon its export commerce in order to prevent total loss of the capital invested therein. Such competing foreign corporations so favored necessarily

included not only those which manufactured for export and exported the goods manufactured, but also those which purchased goods in the United States and exported and disposed of the same in foreign countries. While these very high rates of tax were being imposed upon the plaintiff in error as an American corporation during the life of the said Revenue Act of 1918, the said competing foreign corporations were *entirely* exempted from the tax; but it is of interest to note that when, under the succeeding Revenue Act of 1921 the excess-profits tax was abolished and the rate of tax was limited to 10 or 12½ per cent., the said competing foreign corporations which manufactured or produced goods in the United States for export and exported such goods were taxed on a part of their income derived from such business (see pp. 16, 17, *supra*), this imposition upon them of a part of the tax imposed upon the American corporations in like business being evidently due to the recognition by Congress of the fact that it had imposed an unequal and unjust burden upon the American corporations in the Act of 1918.

In the annual report of the Secretary of the Treasury for the fiscal year ended June 30, 1919, in recommending the repeal of the excess-profits tax, he said (on pp. 23, 24):

> "Still more objectionable is the operation of the excess-profits tax in peace times. It encourages wasteful expenditure, puts a premium on over-capitalization and a penalty on brains, energy and enterprise, discourages new ventures, and confirms

> old ventures in their monopolies. In many instances it acts as a consumption tax, is added to the cost of production upon which 'profits are figured in determining prices and has been, and will, so long as it is maintained upon the statute books, continue to be a material factor in the increased cost of living'."

This statement of the Secretary of the Treasury, although made without reference to the discrimination in the Revenue Act of 1918 (*supra*) against American corporations engaged in export trade, will serve to illustrate the extent of the direct burden imposed by the discriminating tax on the business of exporting carried on by the plaintiff in error.

In The Railroad Tax Cases (13 Fed. 722), the Court said (on p. 733):

> "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, *for it is in that form that oppressive burdens are usually laid.*" (The italics are ours.)

Similar Exemption to Nonresident Alien Individuals and Corporations of Porto Rico and The Philippine Islands.

It is to be noted that the law under which the alleged tax was assessed upon the plaintiff in error, known as the Revenue Act of 1918 (40 Stat. at L., Chap. 18) provided in Section 213(*c*) that nonresident alien individuals should have the same exemption that was

granted to foreign corporations by Section 233(*b*) of that Act (see p. 15, *supra*) with respect to income derived from the business of exporting carried on in the United States. It is well known in commercial circles that there are many firms or partnerships engaged in the exporting business in the United States which are composed of alien individuals, of whom nearly all are nonresident aliens. It is characteristic of such firms of aliens in the export trade that only one or two partners will reside in the United States (and hence be taxed on their income derived from the exporting business of the firm) while all the other partners will reside abroad (and hence be exempt from tax on their income derived from such business). It is to be noted also that under the prior laws of 1894, 1909, and 1913 (see pp. 18-21, *supra*) nonresident alien individuals, as well as foreign corporations, were subject to the tax *with respect to income derived from business transacted and capital invested in the United States.* This was in harmony with the principle stated in Shaffer *v.* Carter (*supra*); and with the principle stated by the English Court in Sulley *v.* Attorney General (see pp. 27, 28, *supra*), wherein it was said:

> "Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, *viz.*, where his profits come home to him. That is 'where he exercises his trade'."

It is to be noted also that the said Revenue Act of 1918 contained the following provisions:

> "Sec. 1. * * * The term 'foreign' when applied to a corporation or partnership means created or organized outside the United States;
>
> The term 'United States' when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia;"
>
> * * * * *
>
> "Sec. 260. That any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States, shall be subject to taxation under this title only as to income derived from sources within the United States, and in such case the tax shall be computed and paid in the same manner and subject to the same conditions as in the case of other persons who are taxable only as to income derived from such sources."

Under the authority of these provisions, individuals who were citizens of Porto Rico or the Philippine Islands (but not otherwise citizens of the United States) were granted the same exemption from the tax that was given to nonresident alien individuals under Section 213(*c*) of that Act; and corporations organized under the laws of Porto Rico or of the Philippine Islands, and carrying on the business of exporting within the United States, were granted the same exemption from the tax that was given by Section

233(*b*) to corporations organized under the laws of foreign countries (see Regulations 45 Relating to the Income Tax and War Profits and Excess Profits Tax under the Revenue Act of 1918, Arts. 1131-1133).

The Serious Situation in the Export Commerce of American Merchants and Manufacturers.

The plaintiff in error's business of exporting must meet the competition, not only of all others in that business in the United States, but also of merchants and manufacturers in all other parts of the world. In domestic business an occupation has protection by distance and duties on imports from the competition of merchants and manufacturers in foreign countries, but American merchants and manufacturers in exporting business must meet the competition of such foreign merchants or manufacturers in their own and other foreign countries, in the efforts to find foreign markets for American products.

The serious situation which confronts American merchants and manufacturers engaged in foreign commerce, under the tax discrimination which is complained of in the case of the plaintiff in error, was referred to by the Solicitor General in his motion to advance the hearing of the case at bar, wherein he stated that the report of the Federal Trade Commission (Report on Methods and Operations of Grain Exporters, published on May 16, 1922) showed that in the year 1921 foreign corporations exported more than half of all the wheat shipped from this country.

In an address by the Secretary of Commerce in New

York City on November 8, 1923, before the American Marine Congress, which was published in the *New York Times* and the *Sun and Globe* on November 9, 1923, attention was called to the control acquired by foreign merchants over American exports and imports. A copy of this address, prepared for the press by the Secretary of Commerce, is submitted as an appendix to this brief (on pp. 104-111, *infra*). This address shows that, of the total quantity of American goods exported, by far the greater percentage are sold without the United States by foreign merchants who take delivery of such goods in the United States. It is well known that this was also the situation during the war with respect to the purchase of American products for export by foreign governments and merchants; and that during the war foreign governments controlled most of the available cargo space on vessels sailing for Europe. Control of imports into the United States by foreign merchants necessarily means a large measure of control over exports from the United States, since the exports must be paid for largely from the proceeds of imports.

The Purpose of the Constitutional Provision Forbidding Taxation of Exportation.

In Fairbank *v.* United States (181 U. S. 283), wherein this Court said that no legislation can be tolerated which "destroys the spirit and purpose of the restriction", reference was made to the reason and purpose of the constitutional provision in Paragraph 5 of Section 9 of Article I, which was to prevent the possibility of any discrimination affecting the exporta-

tion of any articles produced in any state or section of the United States, and to make all exportation of all articles free from being a source of revenue to the national government. The Court said (on p. 293):

> "So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports."

The discriminating tax in the case of the plaintiff in error defeats the meaning and purpose of the Constitutional provision. Can it be supposed that the framers of the Constitution, who intended to prevent any discrimination by taxation for or against the products or the exporting business of any of our citizens in any part of our country, intended to permit a discrimination in taxation in favor of the products and exporting business handled by foreign corporations and aliens in this country, and against the products and exporting business handled by our own citizens and corporations in their own country?

It is clear from the debates of the Constitutional Convention that the framers of the Constitution would have considered this provision violated by a tax law giving preference to the exporting business of corporations organized under the laws of any of the New England States, or of the Southern States, or of any other section; and for the same reason a tax law giving preference to the exporting business of foreign corporations violates this provision of Article I of the Constitution.

In Conclusion.

Briefly the plaintiff in error contends that the amount paid by it under the Revenue Act of 1918 on its net income or profits derived from the business of manufacturing for export and exporting which it carried on within the United States was not the exertion of taxation but the confiscation of its property in violation of the 5th Amendment of the Constitution of the United States because the like net income or profits of foreign corporations derived from the like business of exporting and manufacturing for export carried on by such foreign corporations within the United States and under the protection of the United States, with capital invested in such business within the United States by such foreign corporations, was wholly exempted from tax under said Revenue Act of 1918. The plaintiff in error also contends that since the foreign corporations with which it necessarily competed in such business of exporting within the United States were entirely exempted from tax on the net income or profits derived from the like business of exporting, such discrimination against the plaintiff in error imposed a direct burden on the property which it exported, and on its business of exporting, in violation of Paragraph 5 of Section 9 of Article 1 of the Constitution of the United States.

The judgment of the District Court should be reversed with costs, and the District Court directed to deny the motion made to dismiss the complaint.

Respectfully submitted,

FRANKLIN GRADY,
Attorney for Plaintiff in Error.

P. J. MCCUMBER,
HOMER SULLIVAN,
Of Counsel.

Appendix.

Address by Hon. Herbert Hoover, Secretary of Commerce, Before the American Marine Congress, New York City, Thursday, November 8, 1923.

It is simply a truism to say that we must have an American Merchant Overseas Marine. Entirely apart from the fine sentiment and national pride of a great trading nation in keeping its flag upon the seas, we must have our own ships for the protection of our foreign trade; we must have ships if we would expand our exports on sound lines and we must have them as an auxiliary to our national defense.

It seems worth repeating at times that our international trade is one of the very foundations of our standards of living; that our whole fabric of living and comfort are dependent upon the import of commodities which we do not and cannot ourselves produce—tin, rubber, coffee, sugar, and a score of others; further, in the main the amount of these commodities we can import will depend upon the volume we export. Moreover we need a constant expansion of our export markets to give stability to our internal production by a wider range of customers.

If we are to have secure export markets we must have some sound proportion of American controlled shipping to assure us against combinations in rates which would prejudice our goods in competitive markets. Nor have our merchants been without the experience

of finding that the transport of our goods in foreign bottoms has been taken advantage of by our competitors to learn the details of our trade connections.

The facility of the world in creating combinations in restraint of trade has been growing by leaps and bounds since the war and while we, as a nation, endeavor to curb these activities within our borders, there has naturally been no curbing of these activities abroad when they affect American interests. Today there are many commodities upon which we are dependent by import from foreign lands in which there are combinations in control of price in those foreign lands. Combinations in control of sea rates are the commonest thing in the world shipping fabric. Many of our raw material exports, such as wheat, are sold in the world market in competition with those of other countries and the price level in these cases is the result of competitive streams that flow into these world markets. In wheat the farmer's return is fundamentally the price which he receives at Liverpool less the cost of transportation and handling. Therefore, any increase in shipping rates is in fact a deduction from the price to the farmer. It is just as important to him to be guaranteed reasonable rates of sea transport as of land freight. The real security is an American-owned Merchant Marine. In the long view the expansion of our foreign trade must and will take place in the export of larger proportions of manufactured goods. The primary requisite for such expansion is the assurance of regularity in transportation. Not only do we need

regularity of sailings week by week, in order that the manufacturer may be assured in his problems of delivery, but our merchants and manufacturers require to know that when they have established their goods in foreign lands then regular transportation will be assured to them over years to come. They cannot be dependent upon hazards of foreign ship owners, allied as these owners are with foreign merchants and competitors.

We must have especially regular and positive transportation under our flag on those great trade routes where our commerce can and will expand. Nor can America be dependent for her movement of overseas goods upon the make and break of peace and war in different parts of the world. We have had one gigantic national experience with this already. We must have ships under our own flag if we are to have security in our vital supplies and exports when other nations go to war with each other. As an auxiliary of our national defense we must have preparedness in transport for soldiers and supplies; we must have a training ground for our sailors, or our Navy itself would be helplessly confined to our own coasts.

In a broad sense the American people are endeaving to establish a Merchant Marine that will adequately protect and promote our commerce. The ideal is regular, ferry like service of boats of the cargo liner type with some passenger capacity traversing the great trade routes of the world and carrying at least 50% of our foreign trade. Today, outside of oil, we are carrying less than 20%. Some day we will attain such a mer-

chant marine. Our national necessities, the capacity of our people for organization, for mechanical development and enterprise will some day bring it about. In the meantime we have much divided opinion in public mind, in the shipping world and in Congress, as to method. And our shipping world is suffering from great handicaps.

It is not my purpose to review all these handicaps that are so familiar to you but rather to present to you one single phase that has not been so generally considered that is capable of remedy. That is the relationship that American merchants abroad must bear to the success of an American Merchant Marine. *We will never have a real American Merchant Marine until we have a much larger complement of merchants of our own nationality conducting our commerce in foreign ports. Our raw materials are largely sold at our shores to foreign merchants.* They dictate the shipping. Again most of our purchases of raw materials are for delivery at our shores. The foreign merchant again controls the shipping. If we except oil, most of our manufactured goods for export are dealt with by foreign merchants. How real all this is, is shown by the fact that except oil only about 12% of our imports and exports were managed by American merchants abroad.

The situation is just as insecure for our exports as for our shipping. If we would make sure of the continuous flow of goods we must have the American on the ground distributing to the foreign retailer, secur-

ing business by his services as well as his price. Many an American merchant has seen his established trade disappear because he depended upon a foreign merchant not to show patriotism to his own country. This situation has been contributed to by the tendency of some of our manufacturers to regard export as a happy hunting ground in times of domestic depression, to be abandoned in times of domestic demand. *We cannot have a Merchant Marine without an army of American merchants in foreign ports. This is the foundation of our British competitors.*

No stable consumption of goods can be built up on such a fabric. And other things being equal, the merchant ships his goods under his own flag, even giving a preference to that flag. Our competitors certainly do so. The lack of growth in our merchant personnel abroad is, I believe, to a large degree the fault of our Government for reasons I will detail later.

Despite our expanding export and import trade, the number of our merchants abroad has decreased in late years and yet if we would have a merchant marine they must be increased. The taxation policies of our Government have been to some degree responsible for this situation.

We are asking our merchants to expatriate themselves in order to sell American goods and manage American ships. Up to 1919 our own Government imposed upon them in income taxes the same percentage of their profits as upon our merchants resident at home. They also paid taxes to the Government where

they resided. We thus demanded that they pay double taxes. Some relief is afforded by the provision that the amount of taxes paid in the foreign countries may be deducted from the income tax which is payable to the United States, but this does not cover the entire problem. For instance, American merchants in the Latin-American countries, the Orient and some European states pay our very high income tax, while the amount deductible for taxes paid in those countries is very small. British merchants resident there pay no taxes to their home government, and thus the cost of our doing business through merchants of our own nationality willing to reside abroad in the cause of promotion of American commerce is greater than that of our competitors or of our doing business through foreigners.

It is, therefore, felt by many as more economic for Americans to stay at home and sell their goods in the Argentine through a German or a British merchant. Scores of our merchant firms, totally discouraged, have thrown up the sponge.

Before the war, there were at least 1,000 American engineers employed abroad at substantial salaries. These men went abroad to install American methods, American machinery and equipment in the production of raw materials, and in transportation. These salaried workers found themselves at the end of the war subject to two gigantic income taxes and thus their foreign mission was unprofitable. I doubt whether there are 100 of them left in foreign territories today. The re-

lief given is only partial, as I have said above. A vast stream of American machinery and equipment that followed in their wake has dried up.

There is one phase of this matter of vital importance to our farmers. Over 80 per cent. of our agricultural exports go to Europe. Before the war European merchants bought stocks of wheat and grain during our fall marketing season and thus assisted in financing the crop. They carried stocks in European warehouses, thus relieving our congestion. Today, shortage of finance and credit leads them to buy from day to day and thrusts the burden of carrying the world's seasonal reserves either upon our own farmers or upon our merchants. If our merchant firms were established in Europe it would be possible for them to give delivery at that end and to establish short credits to their customers—all of which would relieve our farmers. But American merchants are not likely to establish in the lower tax countries in Europe and to pay high income taxes compared with our competitors.

Another case of pertinent order is that on the China Coast. Inasmuch as China has no dependable corporation law much Chinese capital is invested in foreign corporations under the management of, or in partnership with, Europeans. As foreign governments exact no home taxation from such corporations or their stockholders the Chinese naturally prefer them. We attempted to remedy this by Congressional authority to establish special American corporations under Federal authority, but the restrictions are such that the Act

has failed its purpose. Three large American managed businesses have gone over to control of our competitors at a real loss to our foreign trade and the great discouragement of our merchants. Similar questions are arising in the Philippines.

I wish to repeat that if we are to secure the establishment of a merchant marine we must secure dispersion of the American merchant and our Government today is one of the most destructive influences in the whole matter. I do not wish to argue the theory that Americans who are engaged abroad in reproductive work should not bear their share of the national burden. I would only point out that other nations have found it is uneconomic to impose this burden upon them, and that we are left in a prejudiced position. Nor am I pleading the cause of the American expatriot, who prefers foreign civilization as a luxury, who is bringing no returns to his country by way of his savings or by way of his expansion of American trade.

These two groups are quite distinct. They can be distinguished in tax measures so as to apply the relief only to incomes earned abroad. One is tied passionately to his country's interests and the expansion of its welfare; America to him is the home he serves in managing her trade. He will yet return with his savings to add to the national wealth, whereas the other is but a pensioner on our national resources. And yet as a nation we penalize the one who brings us service and credit. (The italics are ours.)

No. 320 and No. 547.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 320.

NATIONAL PAPER AND TYPE COMPANY, *Plaintiff in Error,*
v.
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant in Error.

No. 547.

BARCLAY & CO., INCORPORATED, *Plaintiff in Error,*
v.
WILLIAM H. EDWARDS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE PLAINTIFFS IN ERROR

FRANKLIN GRADY,
Attorney for the Plaintiffs in Error.
P. J. MCCUMBER,
HOMER SULLIVAN,
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE PLAINTIFFS IN ERROR

The brief for the defendants in error, in its statement of the question therein designated as No. 1 of the questions involved in the two cases at bar, and in the statement of the first point of the argument (which

relates to the second point of the argument for the plaintiffs in error) does not state correctly the contention of the plaintiffs in error in this point. The plaintiffs in error contend, as stated in the complaints and in the second point of their argument, that *by reason of the discrimination set forth therein* the alleged taxation imposed upon the net income or profits of their businesses of manufacturing or purchasing articles in the United States and exporting and selling such articles in foreign countries was a direct burden on and impediment to their said businesses of exporting or their export commerce, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States. The brief for the defendants in error entirely ignores this discrimination in the tax, with respect to this provision of the Constitution. The discrimination in taxation against the export commerce of the plaintiffs in error clearly makes the said alleged tax a direct burden on their export commerce, upon the authority of I. M. Darnell & Son Co. v. Memphis (208 U. S. 113), Woodruff v. Parham (8 Wall. 123), Brown v. Houston (114 U. S. 622), William E. Peck & Co. v. John Z. Lowe, Jr., Collector (247 U. S. 165), and United States Glue Co. v. Oak Creek (247 U. S. 321), as cited in the first brief for the plaintiffs in error.

The statement in the brief for the defendants in error that the Constitutional prohibition against the taxation of exports is narrower than the Constitutional provision forbidding the imposition by a State of a burden upon interstate commerce, is apparently intended to mean that that which constitutes a tax burden upon interstate commerce when imposed by a State would not be a tax burden upon export commerce when

imposed by Congress. This view is contradicted by decisions of this Court, which have repeatedly applied the same rule to State taxes bearing upon interstate or foreign commerce and to Federal taxes bearing upon export commerce. In United States Glue Co. v. Oak Creek (*supra*) this Court applied to interstate commerce with respect to a State tax the rule laid down in William E. Peck & Co. v. John Z. Lowe, Jr., Collector (*supra*) with respect to export commerce as affected by a Federal tax. Both of these cases relate to taxes on net income, and in the former case this Court said that the State tax on net income there considered was not a burden on interstate commerce

> "* * * if there be no discrimination against interstate commerce either in the admeasurement of the tax or the means adopted for enforcing it."

In the cases of the plaintiffs in error there was a discrimination against their export commerce in *the admeasurement of the tax and the means adopted for enforcing it.*

The brief for the defendants in error refers to foreign corporations engaged in the occupation or business of exporting within the United States as *nonresident foreign corporations.* In Paragraph 1 of Section 217 of the Revenue act of 1921 foreign corporations transacting business within the United States are described as *resident foreign corporations,* so that the reference in the brief for the defendents in error to such corporations as "nonresident foreign corporations" would seem to be in conflict with such Act of Congress. In St. Clair v. Cox (106 U. S. 350), this Court said (on p. 355):

> "* * * Whilst the theoretical and legal view that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred."

This view of the status of a corporation transacting business in a State other than that in which it was organized is practically illustrated by the case of Underwood Typewriter Co. v. Chamberlain (254 U. S. 113), wherein this Court dealt with a corporation organized under the laws of Delaware which manufactured its goods in Connecticut and shipped such goods to other States and there sold them. The main office of this corporation was in the city of New York, where necessarily the proceeds of such sales were received, yet this Court held that the net income derived from the goods so manufactured in Connecticut was *earned* in Connecticut.

With respect to this matter, it is of interest to note that in the lower court's opinion in the case of Shaffer v. Carter, 252 U. S. 37 (Shaffer v. Howard, District Court, E. D. Oklahoma, 250 Fed. 873), it was said (on p. 876):

> "* * * If, through accident or design, an individual dwells in one State, while his business is in part or wholly located in other states, so that

> he needs, commands, and receives the protection of several states, can his income therefrom escape imposition? It may be true that the State which protects the person of the one who creates, receives, or enjoys an income may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand, as pay for that protection, a tax measured by that part of his income which came from that business. If in the one case the State of residence can tax the right to create, receive, and enjoy an income, why can not another State tax his right to create and receive an income from business within its borders?"

This principle was affirmed by this Court in its opinion in that case when brought here on appeal, and this Court said:

> "* * * That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

And it was also declared by this Court that the business and property in Oklahoma belonging to Shaffer the nonresident were *the source of the net income* that

was taxed by Oklahoma, although the products of that business were removed from and sold outside of that State. This Court said (on p. 59 of its opinion):

> "Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed."

These citations are a sufficient answer to the assertion in the brief for the defendants in error that the net income of the plaintiffs in error with which the cases at bar are concerned, and the like net income of the foreign corporations carrying on like business in the United States, are from sources within foreign countries. And this assertion, so contrary to fundamental principles, is again explicitly contradicted by this Court in William E. Peck & Co. v. John Z. Lowe, Jr., Collector (*supra*), wherein this Court determined the status of the net income referred to, whether of American or of foreign corporations, saying (on p. 175):

> "* * * The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the con-

> clusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation."

The tax on net income which was dealt with by this Court in that case was imposed by the Federal Income Tax Law of 1913 on the net income of both American and foreign corporations derived from the business of exporting carried on within the United States, which business, as stated by this Court, consisted of "buying goods in the several States, shipping them to foreign countries and there selling them." In the first briefs for the plaintiffs in error citations were given from the Federal income tax laws of 1894, 1909 (Corporation Tax Law), and 1913, showing that under these statutes, as well as under earlier income tax laws of the United States, foreign corporations were taxed upon their net income accruing with respect to "business transacted and capital invested" in the United States, and that under these provisions foreign corporations were taxed on their net income from the business of exporting transacted within the United States. It is a matter of official record in the Treasury Department that such net income of such foreign corporations was taxed under these prior statutes as required by said statutes. The brief for the defendants in error suggests that to tax such net income of the foreign corporation or nonresident alien is to tax income beyond the jurisdiction of the United States; but such jurisdiction has been repeatedly exercised under said prior income tax laws

and has never before been questioned. It can not be questioned now, since such net income has the same status in the United States as have articles intended for exportation before exportation begins. It is also settled by repeated decisions of this Court, cited in the first briefs for the plaintiffs in error, that within the taxing jurisdiction the tax must fall alike upon all those engaged in like occupations and under like circumstances and conditions, in order that the so-called tax may actually be a tax and not an arbitrary exaction in violation of due process of law.

The statement in the brief for the defendants in error concerning the extent of the power of Congress to tax with the limitations stated, have no application to the cases of the plaintiffs in error, since such power to tax, beyond the admitted exception as to exports, is not challenged in the cases at bar. It is not the power to tax, but the power to impose an arbitrary exaction in the guise of a tax, that is challenged as a violation of due process of law. The brief for the defendants in error cites the statement of this Court in Brushaber v. Union Pacific R. Co. (240 U. S. 1) that "the due process clause of the Fifth Amendment * * * is not a limitation upon the taxing power conferred upon Congress," but omits the words of this Court, speaking by Mr. Chief Justice White, which immediately follow this statement and must be taken therewith in order to state accurately the doctrine laid down by this Court. These words of this Court are:

> "* * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise

> of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

It has been clearly shown in this and the first briefs filed for the plaintiffs in error that this Court, in its decisions affirming the power of the States to tax net income derived from interstate and foreign commerce transacted within their borders by nonresident individuals and corporations foreign to such States, has established principles which contradict the contentions of the defendants in error. If such contentions could be sustained the effect would be to reverse the decisions of this Court in such cases as Shaffer v. Carter (*supra*), Underwood Typewriter Co. v. Chamberlain (*supra*), United States Glue Co. v. Oak Creek (*supra*), and other like decisions, upholding the power of the States to tax net income from business transacted and capital invested within the States by such nonresident individuals and foreign corporations, regardless of where the products of such business are sold.

Respectfully submitted,

FRANKLIN GRADY,
Attorney for the Plaintiffs in Error.

P. J. MCCUMBER,
HOMER SULLIVAN,
Of Counsel

No. 547.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

BARCLAY & CO., INCORPORATED,
Plaintiff in Error,

vs.

WILLIAM H. EDWARDS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant in Error.

MOTION FOR REHEARING

FRANKLIN GRADY,
P. J. McCUMBER,
HOMER SULLIVAN,
Attorneys for Plaintiff in Error.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 547.

BARCLAY & CO., INCORPORATED,
Plaintiff in Error,

vs.

WILLIAM H. EDWARDS, as Collector of Internal Revenue for the Second District of New York,
Defendant in Error.

Certificate of Counsel.

We, Franklin Grady, P. J. McCumber, and Homer Sullivan, counsel for the plaintiff in error, file this motion on our own volition, believing that the Court has not settled the issues and contentions in said cause and thereby grave injustice has been done to plaintiff in error. And we further certify that in our opinion said motion for rehearing is well grounded upon the considerations therein submitted and ought to be granted.

FRANKLIN GRADY,
P. J. MCCUMBER,
HOMER SULLIVAN,
Attorneys for Plaintiff in Error.

Motion for Rehearing.

Plaintiff in error petitions the Court for a rehearing in this cause and for reason therefor submits the following considerations.

The opinion of the Court in said cause is as follows:

> "The plaintiff in error is a domestic corporation engaged in business as a manufacturer. It is subjected to an income tax from which foreign corporations are exempted. It charges invalidity on the same grounds as those set up in No. 320, and brought suit to recover the amount of the tax. Its complaint was dismissed on motion of the district attorney upon the authority of National Paper & Type Company *v.* Edwards, Collector of Internal Revenue, 292 Fed. 633, and judgment went on the merits.
>
> The cause was submitted with No. 320, just decided. It presents the same contentions, based upon the same grounds. *And upon the authority of our decision in that case, the judgment below is affirmed.*" (The italics are ours.)

It is important to note that the decision in said cause No. 547 does not specify the Act of Congress under which said cause arose, namely, *the Revenue Act of 1918.* Cause No. 320 arose under the Revenue Act of 1921, and while it related to the same subject it was based on different grounds and for that reason, as hereinafter explained, it is respectfully submitted that *said cause No. 547 can not be decided on the authority of the decision in cause No. 320.*

The Revenue Act of 1921, which succeeded the Revenue Act of 1918, provided with respect to the manufacture of goods within the United States by foreign corporations which they sold in foreign countries that the income derived therefrom *shall be allocated to sources within and sources without the United States, and imposed tax on that part of such income allocated to sources within the United States,* whereas the Revenue Act of 1918, under which said cause No. 547 arose, exempted from tax *all* the income of foreign corporations derived from the manufacture of goods within the United States which they sold or disposed of in foreign countries.

As foreign corporations were therefore taxed under the Revenue Act of 1921 on income earned from manufacturing processes conducted within the United States with respect to the goods which they exported and sold in foreign countries, nothing could have been accomplished by submitting to the Court with No. 320 a second cause under said Revenue Act of 1921. The motion to advance said cause No. 547 for hearing jointly with cause No. 320 was submitted solely because the Revenue Act of 1918 *exempted from tax the income* earned by foreign corporations *from manufacturing processes conducted within the United States.*

The Court in the decision in cause No. 320 said:

> "Here the discrimination if such it can be called is in favor of foreign corporations in respect to taxation of earnings from business done in foreign countries."

And then, dealing with the contention of the Government, the Court said:

> "The Government, therefore, contends, and rightly contends, that domestic corporations are required to pay a tax on their incomes from all sources *while foreign corporations are taxed only on their income from sources within the United States because, to repeat, only that income is earned under the protection of American laws.*" (The italics are ours.)

As the decision in cause No. 320, arising *under the Revenue Act of 1921,* related only to the taxation of income from business done in foreign countries, and since foreign corporations were not taxed *under the Revenue Act of 1918* on that part of their income earned from manufacturing processes conducted within the United States under the protection of American laws, it is respectfully submitted that the grounds in said cause No. 547 *arising under said Revenue Act of 1918* can not be the same as in cause No. 320, and therefore said cause No. 547 can not be decided upon the authority of the decision of the Court in cause No. 320.

Section 233(*b*) of the Revenue Act of 1918, under which said cause No. 547 arose, reads as follows:

> "(*b*) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract

> for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States."

The Attorney General in his opinion (32 Op. Atty. General, 336) construing said Section 233(*b*) of the Revenue Act of 1918 said:

> *"No income is derived from the mere manufacture of goods;* before there can be income there must be sale; *and there is no income from sources within the United States from goods manufactured here* unless there is, in the language of Section 233(*b*), both 'manufacture and disposition of goods within the United States'." (The italics are ours.)

The Revenue Act of 1921 (which succeeded the Revenue Act of 1918) provided in Section 233(*b*) that foreign corporations shall pay tax on income from sources within the United States, and, with respect to foreign corporations manufacturing goods within the United States and selling the same in foreign countries, said act provided in Section 217(*e*) that the income derived therefrom

> "shall be treated as derived partly from sources within and partly from sources without the United States"

and that such income

> "shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary."

This allocation of income provided for in the Revenue Act of 1921 was in accord with the rule announced by this Court in Underwood Typewriter Co. *v.* Chamberlain (254 U. S. 113) wherein it was held that net income from goods *manufactured in Connecticut* which had been removed therefrom and sold in other States or foreign countries *was earned in part from processes conducted within Connecticut.* The Court said:

> "This tax is upon the net profits earned within the State. * * * The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically *the profits earned by the processes conducted within its borders.* It therefore adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State." (The italics are ours.)

This decision was announced by the Court *November 15, 1920,* while the Revenue Act of 1921 was not approved until *November 23, 1921,* and presumably Congress established such allocation in that Act upon the authority of this decision.

It is thus clearly established by Congress and by this Court that income is earned under the protection of American laws from manufacturing processes conducted within the United States regardless of the country in which the goods are sold, and that foreign corporations as set forth in said cause No. 547 *were not taxed* on income so earned within the United

States under the Revenue Act of 1918; and hence it would seem that the Court assumed that said cause No. 547 arose under the Revenue Act of 1921, *which Act only related to cause No. 320.*

The plaintiff in error in said cause No. 547 set forth that foreign corporations manufacturing goods within the United States and disposing of such goods in foreign countries were *entirely exempted* under Section 233(*b*) of the Revenue Act of 1918 from tax on the income derived therefrom, and the brief filed in said cause No. 547, after comparing Section 233(*b*) of the Act of 1918 with Sections 217 and 233(*b*) of the Act of 1921, said on page 17:

> "It is submitted that this allocation under the laws of 1921 and 1924 is a recognition of the peculiarly hostile discrimination against the said business of the plaintiff in error under the Revenue Act of 1918, with which the case at bar is concerned."

In the opinion in cause No. 320, arising under the Revenue Act of 1921, the Court also said:

> "So far as the invocation of Paragraph 5 depends upon discrimination, what we have said disposes of it; if it be independent of discrimination, and based upon the fact of a tax upon exports, it is completely answered and disposed of adversely by William E. Peck & Co. *v.* Lowe, 247 U. S. 165, and needs no further comment."

It is respectfully submitted that said cause No. 547 can not be independent of discrimination when, as clearly shown herein, foreign corporations under the Revenue

Act of 1918 were exempt from tax on that part of their income derived from the manufacture of goods within the United States which they sold in foreign countries. To be independent of discrimination under the reasoning of the Court in the decision in said cause No. 320, such income must have been earned from business done in foreign countries. But as the income earned by foreign corporations under the protection of American laws from manufacturing processes conducted within the United States *was exempt from tax under the Revenue Act of 1918* such discrimination necessarily existed, and hence the tax paid on that part of the income of the plaintiff in error in said cause No. 547 derived under like circumstances and conditions from the manufacture of goods within the United States which said plaintiff in error sold in foreign countries imposed a direct burden on its business of exporting, in violation of Paragraph 5 of Section 9 of Article I of the Constitution, under the rule announced in I. M. Darnell & Son Co. *v.* Memphis (208 U. S. 113); Woodruff *v.* Parham (8 Wall. 123); Brown *v.* Houston (114 U. S. 622); William E. Peck & Co. *v.* Lowe (247 U. S. 165), and United States Glue Co. *v.* Oak Creek (247 U. S. 321).

In Shaffer *v.* Carter (252 U. S. 37) the Court, in dealing with a law enacted by the State of Oklahoma taxing the income of nonresidents derived "from all property owned, and of every business, trade, or profession carried on" therein by persons residing elsewhere, referred to the Federal income tax law of 1913 taxing the income of nonresident aliens *from business con-*

ducted within the borders of the United States, and said on page 54 of said decision:

> "No doubt is suggested (the former requirement of apportionment having been removed by constitutional amendment) as to the power of Congress thus to impose *taxes upon incomes produced within the borders of the United States* or arising from sources located therein even though the income accrues to a nonresident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the 14th Amendment imposes no greater restriction in this regard upon the several states than the corresponding clause of the 5th Amendment imposes upon the United States." (The italics are ours.)

The restriction imposed upon Congress by the 5th Amendment with respect to the taxation of income of nonresident aliens earned under the protection of American laws, to which this decision of the Court refers, can only mean that unless such income of nonresident aliens is taxed by Congress the taxation of like income of American citizens or corporations, derived from like sources within the United States, under like circumstances and conditions, would be contrary to the due process of law clause of the 5th Amendment. The Court in this decision, dealing with the fundamental principle that taxation is the equivalent for the protection which the Government affords to persons and property, said on page 50:

> "That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occu-

pation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement."

In Cooley on Taxation, 3rd Edition, Volume 1, it is said (on p. 419):

> "There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subjects of it or to the extent to which each must contribute. In this respect the legislature is as powerless as any subordinate authority, it being impossible there should be taxation that is at once arbitrary and valid."

In the brief for plaintiff in error in cause No. 547 citations are given from the opinions in Yick Wo *v.* Hopkins (118 U. S. 356); Dent *v.* West Virginia (129 U. S. 114); American Sugar Refining Co. *v.* Louisiana (179 U. S. 91); Soon Hing *v.* Crowley (113 U. S. 703); Raymond *v.* Chicago Union Traction Co. (207 U. S. 20); Truax *v.* Raich (239 U. S. 33); Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. & S. H. Co. (111 U. S. 756); Smyth *v.* Ames (169 U. S. 466); Hayes *v.* Missouri (120 U. S. 68); Hurtado *v.* People of California (110 U. S. 516); Shaffer *v.* Carter (252 U. S. 37); Truax *v.* Corrigan (267 U. S. 334); Brushaber *v.* Union Pacific R. R. Co. (240 U. S. 1), and Lappin *v.* District of Columbia (22 App. D. C. 68). In these opinions it is established that

> (1) The great purpose of the due process of law provisions of the Constitution is to exclude

everything that is arbitrary and capricious in legislation affecting the rights of the citizens.

(2) A discrimination in taxation which is made to depend upon differences of color, race, nativity, nationality, or political affiliations, is arbitrary and capricious.

(3) Aliens in the United States are protected by the due process of law provisions of the Constitution from legislative discrimination against them in their occupations by reason of their being aliens.

(4) All occupations in the United States are open to everyone on like conditions, and every citizen has the right to carry on any lawful business subject only to such restrictions and burdens as are imposed upon all persons of like age, sex and condition.

(5) This right of American citizens to pursue their vocations *within the United States* on an equal footing with all others under like circumstances and conditions is a distinguishing feature of our republican institutions, and an essential element of that freedom which American citizens claim as their birthright.

(6) American corporations are citizens within the meaning of the due process of law provisions of the Constitution; and assessments or taxes upon certain corporations different from those imposed upon other corporations of the same class for the same year, resulting in disparity or discrimination, are in violation of due process of law.

(7) A gross and patent inequality in a tax law of Congress is not the exertion of taxation but the confiscation of property in violation of the due process of law clause of the Fifth Amendment of the Constitution.

(8) In imposing taxes upon incomes produced within the borders of the United States or arising from sources located therein, the taxation by Congress of citizens and residents while exempting such income accruing to nonresident aliens is in violation of the due process of law clause of the Fifth Amendment of the Constitution.

The emphasis placed by the Court in its finding in the decision in cause No. 320 *that the income was derived from business done in foreign countries,* and that foreign corporations were taxed on income from sources within the United States *because "only that income is earned under the protection of American laws",* necessarily means when applied to cause No. 547 that if income earned from manufacturing processes, conducted within the United States by foreign corporations, is exempt from taxation then the taxation of like income earned by American corporations under like circumstances and conditions must be contrary to due process of law.

If this interpretation of the decision of the Court in said cause No. 320 is not correct, then it would not be contrary to due process of law to tax the income of American citizens and corporations earned from any business or occupation within the United States such as

banking, insurance, and other forms of business activities, when aliens admitted under treaties to transact like business within the United States on the same terms are wholly exempt from like tax. And this would be so notwithstanding that the Court has decided *that it would be contrary to due process of law* if such discrimination were applied *against* aliens engaged in earning their livelihood within the United States under the protection of American laws.

WHEREFORE, in view of the reasons stated herein which, it is respectfully submitted, clearly establish the fact that said cause No. 547 can not be decided on the authority of the decision of the Court in cause No. 320, the plaintiff in error in said cause No. 547 prays for a rehearing.

FRANKLIN GRADY,
P. J. MCCUMBER,
HOMER SULLIVAN,
Attorneys for Plaintiff in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

NATIONAL PAPER AND TYPE COMPANY, plaintiff in error
v.
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE for the Second District of New York, defendant in error — No. 320

BARCLAY AND COMPANY, INC., PLAINTIFF in error
v.
WILLIAM H. EDWARDS, COLLECTOR OF Internal Revenue for the Second District of New York, defendant in error — No. 547

WRITS OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS IN ERROR

STATEMENT OF FACTS

These two cases, although arising under two different Revenue Acts, involve substantially the same questions.

the United States by the plaintiff and its exportation and disposition of those goods in foreign countries. This suit is to recover back that $7,600, which was assessed and collected under sections 230 and 301 of the Revenue Act of 1918 (40 Stat. 1057, 1075, 1088). Claim for refund of that sum was duly filed, and, the Commissioner of Internal Revenue having rendered no decision the eon within six months, suit was brought to secure the refund. The complaint alleged that the taxes on the net income derived from the manufacture of goods within the United States and their sale without the United States were invalid for the same reasons as those suggested in the first case.

THE STATUTES

The pertinent provisions of the two Revenue Acts are as follows:

REVENUE ACT OF 1918

> SEC. 230. (a) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:
>
> (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and * * *. (40 Stat. 1075, 1076.)
>
> SEC. 232. That in the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions al-

lowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226. (40 Stat. 1077.)

SEC. 233. (a) That in the case of a corporation subject to the tax imposed by section 230 the term "gross income" means the gross income as defined in section 213, except that:
* * *

(b) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States. (40 Stat. 1077.)

SEC. 301. (a) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

FIRST BRACKET

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

SECOND BRACKET

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital;

THIRD BRACKET

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets. (40 Stat. 1088.)

REVENUE ACT OF 1921

SEC. 205. (a) That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period. (42 Stat. 232.)

SEC. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per-centum of the amount of the net income in excess of the credits provided in section 236; and * * *. (42 Stat. 252.)

SEC. 232. That in the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the computation shall also be made in the manner provided in section 217. (42 Stat. 254.)

SEC. 217. (a) That in the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262 * * *.

(e) Items of gross income, expenses, losses, and deductions, other than those specified in subdivisions (a) and (c), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary. * * * Gains, profits and income from (1) transportation or other services rendered partly within and partly without the United States, or (2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated

as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold. * * *. (42 Stat. 243, 244, 245.)

Sec. 233. * * *.

(b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by section 243 or 246) in the manner provided in section 217. (42 Stat. 254.)

ARGUMENT

I

A tax upon net income is not a tax upon exportation even if the income is derived from the manufacture or purchase of goods within the United States and their sale without the United States

That a general tax upon net incomes is not a tax upon exports forbidden by the Constitution when laid upon a net income derived from exportation has been definitely settled by this court. In the case of *Peck & Co.* v. *Lowe*, 247 U. S. 165, it held that the tax imposed by Section II of the Act of October 3, 1913, upon all net incomes over a certain amount was not unconstitutional when imposed upon the net income of a taxpayer derived from exporting articles from

the United States. The court says, in its opinion at pages 174–175:

> The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it can not be applied to any income which Congress has no power to tax (see *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is like-

> wise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

At the same term this court upheld the Wisconsin income tax when applied to incomes derived from interstate commerce. The prohibition against a federal tax on exports contained in the Constitution is much narrower than the prohibition against the regulation of interstate commerce by the States. A State may not regulate interstate commerce by taxation, licenses or in any manner whatever, and all transactions which form an inherent part of such commerce must likewise be free from such regulation. Congress on the other hand is forbidden only to lay a tax on articles exported from any State, and this has been construed as prohibiting merely a tax upon the act of exportation or any of the necessary processes or instrumentalities thereof.

Despite this sweeping prohibition of the regulation of interstate commerce by the States, this court held in *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, that a State, in laying a general income tax, may include in the computation of net income gains derived from transactions in interstate commerce without contravening the commerce clause of the Constitution.

The court said, at pages 328–329:

> The difference in effect between a tax measured by gross receipts and one measured by

net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax can not be heavy unless the profits are large. *Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property;* and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States. [Italics ours.]

It must, therefore, be taken to be settled law that a tax on net income derived from exportation is not a tax upon exports forbidden by the Constitution. These cases conclusively dispose of any contention that Congress had no power to levy the taxes imposed in the case at bar. These are general taxes on net incomes, imposed under the authority of the Sixteenth Amendment, and tax the articles exported by plaintiffs or on the exportation thereof no more than any other income tax does. Nor does the fact that the taxes are heavy in any way change its nature. If the taxes are such as Congress had power to impose the question of the rate of taxation is exclusively for Congress.

The fact that the taxes are heavy does not make it a direct burden on exportation, since they are imposed only on the profit derived from the transaction after exportation is completed, when the taxpayer is free to dispose of the profits as he sees fit. Unless the profits are large the tax can not be great, and if large profits are made they may be compelled to bear their share of the expenses of the Government, in such proportion as Congress may see fit. On no theory can the taxes here complained of be declared void as being within the constitutional prohibition of a tax on exports.

II

In taxing the net income of domestic corporations derived from the purchase or manufacture of personal property within the United States and the sale thereof without the United States, and at the same time exempting nonresident foreign corporations from such tax, Congress did not violate the Fifth Amendment

The plaintiffs contend that the exemption of nonresident foreign corporations from such taxes constitutes such a discrimination against domestic corporations; and that so far as the plaintiffs are concerned, these Revenue Acts are arbitrary, oppressive, and capricious, and, therefore, violate the due process clause of the Fifth Amendment.

The taxing power of Congress has three, and only three, express limitations—(1) Congress may not tax exports, (2) direct taxes must be apportioned among the States according to population, (3) indirect taxes must be uniform throughout the United States (by which phrase only geographical or territorial uniformity is meant)—and one implied limitation—Congress may not tax the States, or any governmental agency, instrumentality, or function thereof. Nothing is better settled than that the Fifth Amendment is not a limitation on the taxing power of Congress.

As this court said in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24:

> So far as the due-process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance

> since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution * * *.

To the same effect are *License Tax Cases*, 5 Wall. 462; *United States* v. *Singer*, 15 Wall. 111, 121; *Knowlton* v. *Moore*, 178 U. S. 41, 87; *Patton* v. *Brady*, 184 U. S. 608, 617–620; *McCray* v. *United States*, 195 U. S. 27, 59, 63; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158; *Billings* v. *United States*, 232 U. S. 261, 282; *United States* v. *Doremus*, 249 U. S. 86, 93.

These cases establish conclusively that if Congress is exercising the taxing power, and not under the guise of taxation attempting to do indirectly what it is forbidden to do directly, its acts can not be invalidated under the Fifth Amendment. The only uniformity required of Congress in imposing taxes is the territorial uniformity in regard to duties, imports, and excises, and no contention can be made that the income and excess profits taxes imposed under the challenged acts are not geographically or territorially uniform; that is, do not apply uniformly in all parts of the country.

That they do not burden all taxpayers equally does not make them territorially not uniform. That they apply to all domestic corporations and not to all partnerships can not render them void under any clause of the Constitution, since the distinction between corporations and partnerships is a well recognized one and a classification which Congress has power to make.

That the taxes are imposed on domestic corporations in respect to their income from all sources and on foreign corporations in respect only to their income from sources within the United States, even though the two classes of corporations may be engaged in exactly similar businesses, is not a valid ground for attacking the legality of the taxes. In the cases at bar the income of neither class of corporations is from sources within the United States, but from sources within foreign countries, since it is derived from the sale of goods exported from the United States in foreign countries. Under such circumstances it is quite proper for Congress to distinguish between domestic and foreign corporations, since the basic circumstances are different. It is an ancient maxim that taxes are the correlative of protection. The United States furnishes protection to its own corporations in all their dealings abroad; it does not furnish such protection to foreign corporations as to their extraterritorial operations.

Plaintiffs, American corporations, export and sell goods abroad with the assurance of the United States that they will receive redress for any injury that they may receive in any foreign land. This is not the case with a foreign corporation. If it exports goods from the United States and sells them abroad, it must look to the country of its origin for protection against injury and redress of loss and not to the United States. The entirely different relations in which the two classes of corporations stand towards the United States warrants the difference in treat-

ment in regard to taxation. The plaintiffs and all other domestic corporations pay a tax on their income from all sources, since that income is always earned under the protection of the United States and they have always the right to call upon the United States to protect their interests and redress their wrongs in whatever part of the world their business may take them. Foreign corporations are taxed only on their income from sources within the United States because only that income is earned under the protection of the American laws.

The classification of domestic and foreign corporations for purposes of taxation is not an arbitrary one. It is based on a very fundamental difference between the two and is one which even the States under the equal protection clause of the Fourteenth Amendment would have power to make—much more so Congress, which is subject to no such equal protection requirement. The case comes squarely within the ruling of this court in *LaBelle Iron Works* v. *United States*, 256 U. S. 377, wherein the court said at pages 392–393:

> The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, Sec. 8 * * *. The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under

> the more general requirement of due process of law in taxation. * * * The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. * * * If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the tests applied.

The distinction between the taxation of citizens upon income derived from all sources and of aliens upon income only from sources within the United States has been recognized in all the Federal income tax acts from the Act of August 5, 1861 (12 Stat. 309), down to the Revenue Act of 1921. (*Shaffer* v. *Carter*, 252 U. S. 37, at pages 53, 54.) The comity of nations requires it. It is a fundamental distinction and one which the States must observe under the Fourteenth Amendment to the Constitution, for under that Amendment a State may tax a nonresident only on income derived from sources within its borders. (*Shaffer* v. *Carter*, *supra*; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60.)

To argue that Congress *must* disregard this distinction under penalty of want of due process of law in taxation is indeed a remarkable contention. It has no basis either in principle or authority.

While there can be no doubt that Congress might under guise of an excise tax on the privilege of doing any business in this country require all foreign corporations exporting goods therefrom to pay a tax meas-

ured by the amount of net income derived from the sale of goods so exported, there is great doubt of the jurisdiction of Congress to tax directly the income of a nonresident alien derived from sources within foreign countries. To attempt to impose such a tax would be to attempt to tax a subject beyond the jurisdiction of the United States, and an exaction of that kind, if it could be enforced, would not only be an abuse of the taxing power but destructive of our commercial intercourse with other nations. Recognizing this situation, Congress has not attempted to tax income of nonresident aliens or of foreign corporations from sources outside the United States, and plaintiffs insist that unless it does so, or imposes some other kind of tax which will equalize the burden on all foreign corporations engaged in a similar business, Congress may not tax its income at all. To state this proposition is to refute it.

As shown by the cases above cited there is no requirement in the Constitution that tax burdens shall be equal provided that they operate with geographical uniformity on all persons similarly situated. That these taxes do so can not be denied.

No argument can reasonably be made that in enacting these statutes Congress was not exercising the taxing power but attempting to enrich foreign corporations engaged in the export trade at the expense of domestic corporations or to drive domestic corporations out of that business. The Revenue Acts clearly show that they were designed solely for the purpose of raising revenue and had no ulterior motive

behind them. But if Congress was exercising the taxing power, then none of the limitations imposed upon this power by the Constitution has been overstepped. Foreign corporations, whose situation is fundamentally different, are classified and treated differently from domestic corporations. The classification is neither arbitrary nor unjust.

The fact that by reason of such classification foreign corporations have a lighter tax burden, so far as this country is concerned, than domestic corporations may be the proper subject for an appeal to Congress, but is not a ground for declaring the taxes to be void.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

NELSON T. HARTSON,
ROBERT P. REEDER,
Of counsel.

NOVEMBER, 1924.